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Supreme Court of the United States

OCTOBER TERM, 1932

No. 27

THE STEWART DRY GOODS COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

No. 28

FRED LEVY, ET AL.,

Appellants,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

No. 29

J. C. PENNEY COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

No. 30

KROGER GROCERY & BAKING COMPANY,

Appellant,

v.

JOHN B. LEWIS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

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TABLE OF CONTENTS

PAGE

Introductory Statement 1
Questions involved 3
Kentucky Gross Sales Tax Act 3
Taxes involved 6
Bills of Complaint 8
The Evidence 9
Stewart tax one-half that assessed against 16,374 competing merchants 11
Kroger with 3½% of sales will pay almost double the tax paid by 16,374 merchants 11
Summary of Argument 12
I. Appellants have no adequate remedy at law and are entitled to an interlocutory injunction 12
(a) The Act provides no way by which a taxpayer who has paid under protest can obtain repayment if the Act is declared invalid. In such event instead of giving the taxpayer his money back, he is required to take a so-called state warrant on a bankrupt fund out of which no warrant has been paid for over five years 14
State warrants outstanding $9,800,000.00 against $12,000.00 in general fund..... 15
Allegations of bills admitted to be true by defendants' motion to dismiss 15
Declaration of Legislature of Kentucky in regard to outstanding warrants (Acts of 1932, Ch. 20, pp. 119-123) 18
Declaration of Court of Appeals of Kentucky in regard to outstanding warrants (State Budget Commission v. Lebus, 244 Ky. 700) 20
Declaration of defendants in these cases in regard to outstanding warrants 21
Kentucky Law in regard to order of payment of warrants 23
(b) Kentucky has not consented to being sued at law in the Federal Courts 29
Kentucky law provides that suit against Auditor must be filed in Franklin County Circuit Court... 31
(c) The only remedy provided in the Act is an action in mandamus against the State Auditor, which the Federal Courts cannot entertain 35
(d) Appellants cannot refuse payment of the tax and subject themselves to suit because of the drastic civil and criminal penalties provided in the Act 37

PAGE

(e) The amount of tax assessed under the Act against the appellant is very large, causing serious financial embarrassment to require its payment. The right to recover back this tax if it should be paid under protest is so uncertain as to leave the appellants without a complete and efficient remedy except in equity ... 38

(f) Appellants are entitled to maintain these actions as class suits under Equity Rule 38 40

Opinion of the lower Court 41

Section 10 an integral part of Act and if law is invalid Section 10 is inoperative 42

The lower Court is incorrect in its argument in regard to mandamus 45

The lower Court in its opinion concedes our claim that a meaningless judgment would not be an adequate remedy at law 47

The lower Court indicated that it was not certain as to plaintiff's rights under Section Ten. This lack of certainty gives plaintiff a right to proceed in equity 48

The lower Court's argument that Legislature may enact a measure looking to the payment of warrants does not give complainants an adequate remedy at law 51

II. Appellants are entitled to an interlocutory injunction. 53

(a) Under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813 53

(b) Because the challenged Act deprives them of the equal protection of the laws 55

Illustrations of discrimination 55

Cases relied on by Defendants 82

Clark v. Titusville, 184 U. S. 329 82

Magoun v. Illinois Trust, 170 U. S. 283 85

Metropolis Theater Co. v. Chicago, 228 U. S. 61.. 87

Quong Wing v. Kirkendall, 223 U. S. 59 88

Pacific Fisheries v. Alaska, 269 U. S. 269 89

State Board of Tax Commissioners v. Jackson, 283 U. S. 527 90

(c) Appellants are entitled to an interlocutory injunction because the Act violates the commerce clause of the Federal Constitution 93

The Act imposes a tax on sales of foreign grown farm products and exempts like products raised in Kentucky 93

The Act directly taxes the sale of products moving in interstate commerce 101

PAGE

(d) Appellants are entitled to an interlocutory injunction because the Act is confiscatory and constitutes an attempt to take the property of the appellants without due process of law 105

Kroger net profit 110

Effect of tax on concerns with varying gross sales at various profit rates 113

Kentucky cases 115

Moore v. State Board of Charities and Corrections, 238 Ky. 243, 239 Ky. 729 120

Conclusion 129

Appendix A (Kentucky Gross Sales Tax Act) 130

CASES CITED.

A

PAGE

Abie State Bank v. Bryan, 282 U. S. 765 16
Adams v. Tanner, 244 U. S. 590 79
Alaska ads. Pacific Fisheries, 269 U. S. 269 ..... 82, 89
Allen v. Louisiana, 103 U. S. 80 42
Ames ads. Smythe, 169 U. S. 466 ..... 33, 34
Ashbrook ads. State, ex rel., Wyatt, 154 Mo. 375, 48 L. R. A. 265 66
A. T. & S. F. Ry. Co. ads. Love, 185 Fed. 321 53
Atchison, etc., Co. v. Matthews, 174 U. S. 96 69
Atlantic Coast Line v. Daughton, 262 U. S. 413 ..... 42, 49
Atlantic Coast Line ads. Standard Oil Co., 13 Fed. (2d) 633 ..... 33, 46

B

Baldridge ads. Liggett Co., 278 U. S. 105 ..... 67, 109, 115
Baltimore ads. Guy, 100 U. S. 434 ..... 95, 96
Banton ads. Tyson & Brother, 273 U. S. 418 ..... 79, 108
Barber ads. Minnesota, 136 U. S. 313 99
Bauer ads. Rosenbaum, 120 U. S. 450 36
Bell's Gap R. R. v. Penna., 134 U. S. 232 ..... 67, 68
Bethlehem v. Flynt, 256 U. S. 421 ..... 89, 99, 103
Blodgett v. Silberman, 277 U. S. 1 44
Bosworth ads. Louisville Gas & Electric Co., 169 Ky. 824 35
Bosworth, State Treasurer, v. Shuck, 118 Ky. 458 ..... 24, 25
Bosworth v. State University, 154 Ky. 370 ..... 25, 27
Boyce v. French, 293 Fed. 43 99
Brimmer v. Rebman, 138 U. S. 78 99
Brown v. Houston, 114 U. S. 622 96
Brown ads. Texas Co., 258 U. S. 466 116
Bryan ads. Abie State Bank, 282 U. S. 765 16

C

Campbell Baking Co. v. City of Harrisonville, 19 Fed. (2d) 159 65
Carter ads. Shaffer, 252 U. S. 37 89
C. B. & Q. R. R. Co. v. Osborne, 265 U. S. 14 ..... 22, 33, 34
Central P. R. Co. ads. Payne, 255 U. S. 228, 65 L. Ed. 598 15
Chandler v. Dix, 194 U. S. 590 ..... 29, 30, 34

PAGE

Chicago ads. Metropolis Theater Co., 228 U. S. 61 .....82, 87
Chicago Union Traction Co. ads. Raymond, Treasurer, 207 U. S. 20 39
Citizens Telephone Co. v. Fuller, 229 U. S. 322 68
City of Chicago v. Netcher, 183 Ill. 104 66
City of Danville v. Quaker Maid, Inc., 211 Ky. 677..... 80
City of Duluth v. Rosenblum, 230 N. W. 830 65
City of Harrisonville ads. Campbell Baking Co., 19 Fed. (2d) 159 65
City of Lexington v. McQuillan, 9 Dana 513 119
Clark v. Titusville, 184 U. S. 329 82
Coleman, Auditor, v. Consolidated Realty Co., 239 Ky. 788... 23
Coleman ads. Louisville Gas Co., 277 U. S. 32 .....68, 69
Commonwealth v. Morrell Refrigerator Car Co., 129 Ky. 738.. 31
Commonwealth of Penna. ads. Crew Levick Co., 245 U. S. 292. 104
Connolly v. Union Sewer Pipe Co., 184 U. S. 540 100
Consolidated Gas Co. v. Mayer, 146 Fed. 150; 157 Fed. 849; 212 U. S. 19 38
Consolidated Realty Co. ads. Coleman, Auditor, 239 Ky. 788. 23
Conway ads. Ohio Oil Co., 279 U. S. 813 .....3, 53, 127
Cook v. Pennsylvania, 97 U. S. 566 101
Corporation Commission ads. Frost, 278 U. S. 515 59
Cotting v. Kansas City Stock Yards, 183 U. S. 79 ....38, 64, 71, 80
County of Mobile v. Kimball, 102 U. S. 691 96
Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109 ... 36
Cox ads. Fiscal Court of Owen County, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83 117
C. R. I. & P. Ry. Co. ads. Risty, 270 U. S. 378 .....22, 32, 34, 116
Craig v. Renaker, 201 Ky. 576, 257 S. W. 1018 35
Craig v. Security Producing & Refining Co., 189 Ky. 565 35
Crew Levick Co. v. Commonwealth of Penna., 245 U. S. 292.. 104

D

Darnell & Son v. Memphis, 208 U. S. 113 103
Daughton ads. Atlantic Coast Line, 262 U. S. 413 .....42, 49
Davis v. Wakelee, 156 U. S. 680 .....46, 50
Dawson v. Kentucky Distilleries Co., 255 U. S. 296 50
Dix ads. Chandler, 194 U. S. 590 .....29, 30, 34

E

Engel v. O'Malley, 219 U. S. 128 71
Equitable Purchasing Co. ads. Salisbury, 117 Ky. 348, L. R. A. 1918 A 1114 118
Ex parte Irish, 122 Kan. 33, 250 Pac. 1056 65
Ex parte New York, 256 U. S. 490 34
Ex parte Young, 209 U. S. 123 38

F

Fairmount Creamery Co. v. Minnesota, 274 U. S. 1.....79, 108
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204..... 44
Fiscal Court of Owen County v. Cox, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83 117
Flynt ads. Bethlehem, 256 U. S. 421 .....89, 99, 103
Forrest Moore v. State Board of Charities, 238 Ky. 243; 239 Ky. 729 .....82, 120, 121, 123, 126
Fourth Nat. Bank v. Francklyn, 120 U. S. 747 17

PAGE

Francklyn ads. Fourth Nat. Bank, 120 U. S. 747 17
French ads. Boyce, 293 Fed. 43 99
Frost v. Corporation Commission, 278 U. S. 515 59
Fuller ads. Citizens Telephone Co., 229 U. S. 322 68

G

Garysburg Mfg. Co. v. Pender, 42 Fed. (2d) 500 58
Gillson ads. People, 109 N. Y. 399, 17 N. E. 343 65
Graham v. Norton, 82 U. S. 427 36
Gramling v. Maxwell, 52 Fed. (2d) 256 41
Green v. Taylor, Jr., & Sons, 184 Ky. 739, 212 S. W. 925..... 35
Greene v. L. & I. R. R. Co., 244 U. S. 499 116
Greene ads. Southern Railway Co., 216 U. S. 400 80
Greene v. Wolf, 175 Ky. 58 32
Guy v. Baltimore, 100 U. S. 434 .....95, 96

H

Hager ads. Covington & Cincinnati Bridge Co., 203 U. S. 109. 36
Hager v. Walker, 128 Ky. 1 119
Henrietta Mills v. Rutherford, 281 U. S. 121 22
Highway Commission v. Utah County, 278 U. S. 194 30
Hill v. Wallace, 259 U. S. 44, 66 L. Ed. 822 .....15, 42
Hinson v. Lott, 8 Wall. 148 96
Hopkins Federal Equity Rules (7th Ed.), 198 15
Hopkins v. So. California Telephone Co., 275 U. S. 393 44
Houston ads. Brown, 114 U. S. 622 96
Hyde ads. National Remedy Co., 50 Fed. (2d) 1066 15

I

Illinois Central R. R. v. McKendree, 203 U. S. 514 94
Illinois Trust & Savings Bank ads. Magoun, 170 U. S. 283. .82, 85
Industrial Court ads. Wolff Packing Co., 262 U. S. 522 ....78, 108
Irish, Ex parte, 122 Kan. 33, 250 Pac. 1056 65

J

Jackson ads. State Board of Tax Commissioners, 283 U. S. 527, 38 Fed. (2d) 652 .....56, 68, 82, 90
Jenkins ads. People, ex rel., Moskowitz, 202 N. Y. 53, 94 N. E. 1065 .....65, 67
Jones v. United States, 137 U. S. 202 17

K

Kansas City Stock Yards ads. Cotting, 183 U. S. 79. . .38, 64, 71, 80
Kentucky Civil Code of Practice, Sec. 477 35
Kentucky Constitution, Sec. 231 29
Kentucky Distilleries Co. ads. Dawson, 255 U. S. 296 50
Kentucky Statutes, Sec. 162 22
Kentucky Statutes, Sec. 340 A-1 45
Kentucky Statutes, Sec. 4224 b-9 28
Kentucky Statutes, Sec. 4688 23
Kentucky Statutes, Sec. 4688 a-1 24
Kentucky Statutes, Sec. 4688 a-4 .....24, 27, 49
Kimball ads. County of Mobile, 102 U. S. 691 96
Kirkendall ads. Quong Wing, 223 U. S. 59 .....82, 88
Knapp v. Lake Shore Ry. Co., 197 U. S. 536 36

L

L. & I. R. R. Co. ads. Greene, 244 U. S. 499 116
L. & N. R. R. Co. ads. Siler, 213 U. S. 175 116

PAGE
Lake Shore Ry. Co. ads. Knapp, 197 U. S. 536 36
Lamar v. Micou, 114 U. S. 218 17
Lebus ads. State Budget Commission, 244 Ky. 700 .....17, 20, 21
Lee ads. Northwestern National Ins. Co., 49 Fed. (2d) 274 ... 115
Liggett Co. v. Baldridge, 278 U. S. 105 .....67, 109, 115
Lott ads. Hinson, 8 Wall. 148 96
Louisiana ads. Allen, 103 U. S. 80 42
Louisville Gas & Electric Co. v. Bosworth, 169 Ky. 824 35
Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582 116
Louisville Gas Co. v. Coleman, 277 U. S. 32 69
Love v. A. T. & S. F. Ry. Co., 185 Fed. 321 53

M

McKendree ads. Illinois Central R. R., 203 U. S. 514 94
McQuillan ads. City of Lexington, 19 Dana 513 119
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283 ....82, 85
Maryland ads. Ward, 12 Wall. 418 .....96, 99
Matthews ads. Atchison, etc., Co., 174 U. S. 96 69
Matthews v. Rodgers, 284 U. S. 521 .....29, 40, 47, 48
Maxwell ads. Gramling, 52 Fed. (2nd) 256 41
May ads. Missouri R. Co., 194 U. S. 267 69
Mayer ads. Consolidated Gas Co., 146 Fed. 150; 157 Fed. 849; 212 U. S. 19 38
Memphis ads. Darnell & Son, 208 U. S. 113 103
Metropolis Theater Co. v. Chicago, 228 U. S. 61 .....82, 87
Michigan ads. Walling, 116 U. S. 446 95
Micou ads. Lamar, 114 U. S. 218 17
Minnesota v. Barber, 136 U. S. 313 99
Minnesota ads. Fairmount Creamery Co., 274 U. S. 1 ....79, 108
Minnesota ads. Farmers Loan & Trust Co., 280 U. S. 204 44
Missouri R. Co. v. May, 194 U. S. 267 69
Missouri ads. Welton, 91 U. S. 275 .....94, 95, 96, 103
Moore v. State Board of Charities, 238 Ky. 243; 239 Ky. 729 .....82, 120, 121, 123, 126
Morrell Refrigerator Co. ads. Commonwealth, 129 Ky. 738 ... 31
Murray v. Wilson Distilling Co., 213 U. S. 151 .....30, 34

N

National Remedy Co. v. Hyde, 50 Fed. (2d) 1066 15
Netcher ads. City of Chicago, 183 Ill. 104 66
Newman ads. Rhea, Treasurer, 153 Ky. 604 .....25, 27, 49
New York, ex parte, 256 U. S. 490 34
New York v. Roberts, 171 U. S. 658 99
New York ads. Smith, 227 N. Y. 405, 125 N. E. 841 .....29, 43
North Carolina v. Temple, 134 U. S. 22 29
Northwestern National Ins. Co. v. Lee, 49 Fed. (2d) 274 115
Norton ads. Graham, 82 U. S. 427 36

O

Oak Creek ads. United States Glue Co., 247 U. S. 321 101
O'Connor v. Slaker, 22 Fed. (2d) 147 .....30, 43
Ohio Oil Co. v. Conway, 279 U. S. 813 .....3, 53, 127
Ohio Tax Cases, 232 U. S. 576 116
Old County Trust Co. v. Seattle, 271 U. S. 426 38
O'Malley ads. Engel, 219 U. S. 128 71

PAGE
Osborne ads. C. B. & Q. R. R. Co., 265 U. S. 14 .....22, 33, 34
Owensboro ads. Sperry, 151 Ky. 389 119

P

Pacific Fisheries v. Alaska, 269 U. S. 269 .....82, 89
Payne v. Central R. R. Co., 255 U. S. 228, 65 L. Ed. 598 15
Pender ads. Garysburg Mfg. Co., 42 Fed. (2d) 500 58
People v. Gillson, 109 N. Y. 399, 17 N. E. 343 65
People, ex rel., Moskowitz v. Jenkins, 202 N. Y. 53, 94 N. E. 1065 .....65, 67
People v. Wilson, 249 Ill. 295, 94 N. E. 141 65
Pennsylvania ads. Bell's Gap R. R., 134 U. S. 232 .....67, 68
Pennsylvania ads. Cook, 97 U. S. 566 101
Pennsylvania ads. Quaker State Cab Co., 277 U. S. 389 58
Pierce v. Society of Sisters, 268 U. S. 510 115
Pooley ads. Louisville, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582 116
Pure Oil Co. v. Minnesota, 248 U. S. 158 16

Q

Quaker Maid, Inc., ads. City of Danville, 211 Ky. 677 80
Quaker State Cab Co. v. Pennsylvania, 277 U. S. 389 58
Query ads. Southern Railway Co., 21 Fed. (2d) 333 33
Quong Wing v. Kirkendall, 223 U. S. 59 .....82, 88

R

Raich ads. Truax, 239 U. S. 33 .....78, 108
Raymond, Treasurer, v. Chicago Union Traction Co., 207 U. S. 20 39
Rebman ads. Brimmer, 138 U. S. 78 99
Reeves ads. Smith, 178 U. S. 436 .....29, 30, 34
Renaker ads. Craig, 201 Ky. 576, 257 S. W. 1018 35
Rhea, Treasurer, v. Newman, 153 Ky. 604 .....25, 27, 49
Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378 .....22, 32, 34, 116
Robbins v. Shelby Taxing District, 120 U. S. 489 99
Roberts ads. New York, 171 U. S. 658 99
Rodgers ads. Matthews, 284 U. S. 521 .....29, 40, 47, 48
Rosenbaum v. Bauer, 120 U. S. 450 36
Rosenblum ads. City of Duluth, 230 N. W. 830 65
Rutherford ads. Henrietta Mills, 281 U. S. 121 22

S

Sallsbury v. Equitable Purchasing Co., 177 Ky. 348, L. R. A. 1918 A 1114 118
Seattle ads. Old County Trust Co., 271 U. S. 426 38
Security Producing & Refining Co., 189 Ky. 565 35
Shaffer v. Carter, 252 U. S. 37 89
Shelby Taxing District ads. Robbins, 120 U. S. 489 99
Shuck ads. Bosworth, State Treasurer, 118 Ky. 458 .....24, 25
Silberman ads. Blodgett, 277 U. S. 1 44
Siler v. L. & N. R. R. Co., 213 U. S. 175 116
Slaker ads. O'Connor, 22 Fed. (2d) 147 .....30, 43
Smith v. New York, 227 N. Y. 405, 125 N. E. 841 .....29, 43
Smith v. Reeves, 178 U. S. 436 .....29, 30, 34
Smythe v. Ames, 169 U. S. 466 .....33, 34
Society of Sisters ads. Pierce, 268 U. S. 510 115
So. California Telephone Co. ads. Hopkins, 275 U. S. 393.... 44

PAGE

Southern Railway Co. v. Greene, 216 U. S. 400 80
Southern Railway Co. v. Query, 21 Fed. (2d) 333 33
Sperry v. Owensboro, 151 Ky. 389 119
St. L. & S. W. R. R. ads. Stratton, 284 U. S. 530 .....29, 47, 48
Standard Oil Co. v. Atlantic Coast Line, 13 Fed. (2d) 633..33, 46
Standard Oil Co. ads. Williams, 278 U. S. 235 42
State Budget Commission v. Lebus, 244 Ky. 700 .....17, 20, 21
State Board of Charities ads. Forrest Moore, 238 Ky. 243; 239 Ky. 729 .....82, 120, 121, 123, 126
State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 38 Fed. (2d) 652 .....56, 68, 82, 90
State Freight Tax, 15 Wall. 232 104
State Railroad Tax Cases, 92 U. S. 575 83
State University ads. Bosworth, 154 Ky. 370 .....25, 27
State, ex rel., Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265 66
Stratton v. St. L. & S. W. R. R., 284 U. S. 530 .....29, 47, 48

T

Tanner ads. Adams, 244 U. S. 590 79
Taylor, Jr., & Sons ads. Green, 184 Ky. 739, 212 S. W. 925... 35
Temple ads. North Carolina, 134 U. S. 22 29
Texas Co. v. Brown, 258 U. S. 466 116
Titusville ads. Clark, 184 U. S. 329 82
Truax v. Raich, 239 U. S. 33 .....78, 108
Tyson & Brother v. Banton, 273 U. S. 418 .....79, 108

U

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282 46
Union Sewer Pipe Co. ads. Connolly, 184 U. S. 540 100
United States ads. Jones, 137 U. S. 202 17
United States v. U. S. Steel Corporation, 251 U. S. 417 79
United States Glue Co. v. Oak Creek, 247 U. S. 321 101
U. S. Steel Corporation ads. United States, 251 U. S. 417 79
Utah County ads. Highway Commission, 278 U. S. 194 30

V

Vanzant v. Waddel, 2 Yerger 260 64
Virginia ads. Webber, 103 U. S. 344 .....96, 103

W

Waddel ads. Vanzant, 2 Yerger 260 64
Wakelee ads. Davis, 156 U. S. 680 .....46, 50
Walker ads. Hager, 128 Ky. 1 119
Wallace ads. Hill, 259 U. S. 44, 66 L. Ed. 822 .....15, 42
Walling v. Michigan, 116 U. S. 446 95
Ward v. Maryland, 12 Wall. 418 .....96, 99
Webber v. Virginia, 103 U. S. 344 .....96, 103
Weld County ads. Union Pacific R. R. Co., 247 U. S. 282 46
Welton v. Missouri, 91 U. S. 275 .....94, 95, 96, 103
Williams v. Standard Oil Co., 278 U. S. 235 42
Wilson Distilling Co. ads. Murray, 213 U. S. 151 .....30, 34
Wilson ads. People, 249 Ill. 295, 94 N. E. 141 65
Wolf ads. Greene, 175 Ky. 58 32
Wolff Packing Co. v. Industrial Court, 262 U. S. 522 .....78, 108

Y

Young, Ex parte, 209 U. S. 123 38

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BRIEF FOR APPELLANTS.

INTRODUCTORY STATEMENT.

The appellants here were the complainants below and bring this appeal from a decree of the District Court en-

tered December 9, 1931, dismissing the Bills of Complaint filed in four separate equity suits challenging the validity of the Kentucky "Gross Sales Tax Law" (Session Acts, 1930, Chapter 149). The four cases were heard together and were decided by a single opinion in the Court below. The four complainants represent different classes of retail merchants aggrieved by the challenged Act. Each sued on behalf of its class, as shown by the Bill and by the Court's order in each case. The Bills of Complaint filed below sought relief through applications for interlocutory and permanent injunctions against the enforcement of the Act in question, upon the grounds that the enforcement of the Act against the appellants was in violation of the equal protection and due process clauses of the Federal Constitution. In the Stewart and Kroger cases additional grounds are claimed that it imposes a direct burden upon interstate commerce and thus violates the commerce clause.

The statutory court, as provided by law, was convened. Motions for interlocutory injunctions were filed by the appellants. Affidavits and depositions were offered by the appellants and counter-affidavits by the appellees. The appellees filed motions to dismiss upon the ground that the appellants had a plain, adequate and complete remedy at law. The Court below held that the complainants, under Section 10 of the challenged Act, had an adequate remedy at common law, available in the Federal Courts, and upon that ground alone granted the motions to dismiss. The final entries recite:

> "The Court, being of the opinion that there is a plain, adequate and complete remedy at law afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and solely for the reasons stated in its said opinion, sustains the motion of de-

fendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive or other relief prayed for by it." (Stewart R. 245.)

Pending appeal, satisfactory bonds to secure the payment of the estimated taxes for the years 1930 and 1931 were given and the restraining orders issued at the inception of the suits, for the protection of complainants and the classes represented by them, have been continued in force in accordance with approved practice.

These appeals are in this Court to reverse the judgment of the lower Court denying their motions for interlocutory injunctions and dismissing appellants' Bills of Complaint.

Complainants assert rights, privileges and immunities claimed under the Constitution and Laws of the United States. Moreover there is a diversity of citizenship in the Kroger and Penney cases. Hence, Federal jurisdiction has not been questioned. Two main questions are obviously presented:

(1) Are these cases properly cognizable in equity upon any recognized ground of equitable jurisdiction? If so, the decrees of dismissal must be reversed.

(2) If equity jurisdiction be found to exist, should the motions for an interlocutory injunction have been sustained under the evidence adduced, and particularly under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813?

KENTUCKY GROSS SALES TAX ACT.

The challenged Act, printed as an appendix to this brief, also found in each record at page 6 et seq., on its face imposes a tax upon all retail merchants in Kentucky, except "those (merchants) actually engaged in gardening or farming and selling garden or farm products raised by them in this State." Under this provision a retail mer-

chant who operates a farm in Kentucky and sells the produce in his store is not subject to the tax, but a retail merchant who operates a farm out of the state and sells the produce in his Kentucky store has to pay the tax.

The Act by its terms relates to "revenue and taxation" and is an excise or license tax on retail merchants. The tax is laid upon "the opening, establishing, operating or maintaining any store or stores." The amount of tax is determined by computing the tax upon the amount of gross sales. The rate of tax fixed by Section 2 of the Act is not proportional, but arbitrarily and progressively increases with increased gross sales in the following manner:

It starts out with a tax rate of one-twentieth of one per cent on aggregate gross sales of each merchant up to $400,000.00. The rate is then doubled as to the next $100,000.00, and then multiplied by five as to the next $100,000.00, and then multiplied by eight as to the next $100,000.00, and then multiplied by eleven as to the next $100,000.00, and then multiplied by fourteen as to the next $100,000.00, and then multiplied by seventeen as to the next $100,000.00, up to $1,000,000.00 of gross sales, a flat tax of one per cent being levied on aggregate gross sales in excess of $1,000,000.00.

If a retail merchant has more than one place of business, no matter how unrelated the several places of business or the kind of business conducted therein may be, all the sales of all his places of business are combined to determine the gross sales and rate of taxation. From the tax determined under the schedule of rates stated above, the retail merchant is allowed to deduct all special State license, excise, occupational or corporation taxes due under the provisions of any law, which in practical operation and actual effect, as was the intent and design, practically exempts from the payment of any substantial tax, every retail merchant in the State of Kentucky, except the appellants and a few

other large merchants. This statute widely differs from the "chain store tax laws" heretofore considered by this Court, not only in its scope and purpose, but in the scheme and intent of the discriminatory tax thereby levied. These differences are intentional as well as fundamental. (Stewart 5-6.)

Though the Act professes to tax all retail merchants, in actual operation and effect, as shown by the undisputed facts in the record, it exempts those merchants with a small volume of sales and levies a punitive tax upon those with a large volume of sales, thus penalizing a merchant who has large sales, irrespective of profit or loss, and exempting his competitors who have small sales although their ability to pay from the standpoint of capital or profits may be greater. Although the Act professes to tax each dollar of sales, it taxes the sales dollars of a large merchant more than seventeen times as much as the sales dollar of the merchant whose sales do not exceed $400,000.00. This discrimination exists on the face of the Act between competitors selling the same article at the same price, and at the same profit, such as standard makes of shoes, hats, cigars, cigarettes, fountain pens, sugar, flour, etc. However, in actual operation and effect the discrimination is much greater than appears on the face of the Act; in fact, each of the appellants is taxed practically one per cent on every dollar of sales, whereas the dollar of sales of his competitors is practically tax-free, by virtue of the exemptions or credits contained in Section 4, which are sufficient to wipe out the nominal tax levied against merchants whose sales do not exceed $400,000.00. Section 4 also discriminates against merchants doing business as individuals or as members of a partnership in favor of those doing business as a corporation. The tax levied by the challenged Act upon corporations is credited by the amount of an entirely different tax which it pays for the privilege of doing

business in corporate form under the Kentucky Statutes. Thus the operation of Section 4 discriminates against Levy Brothers and the class represented in the action brought by the Levy partnership who receive no like credit.

If the challenged Act is valid, the taxes imposed upon the four appellants alone for the years 1930, 1931 and 1932 are approximately as follows:

The Stewart Dry Goods Company	$71,500.00
Fred Levy, et al.	16,500.00
J. C. Penney Company	35,000.00
The Kroger Grocery & Baking Company	339,150.00

making a tax against the four appellants for the three-year period of $462,150.00.

When we consider that these enormous taxes are not in lieu of, but in addition to, all the other forms of taxation customarily levied, it is apparent that these actions were instituted to enjoin the collection of a very drastic tax imposition, a tax so large that its payments would cause serious financial embarrassment at least, and where the right of recovering back in the event of a payment under protest is extremely uncertain both as to form of procedure and ability to collect within any reasonable period of time.

Section 5 of the Act provides a penalty of 20% of the tax with interest, for failure to file the report when due and provides an additional penalty of 20%, if collected by proceedings in any Court.

Section 6 authorizes the Tax Commission to examine the books, records, papers, files, and equipment of any retail merchant and confers upon it power to examine witnesses under oath to verify the accuracy of any return made. This section also gives to the State the right to have an attachment and garnishment against the property of the taxpayer without the execution of a bond to enforce the collection of the tax.

Section 7 makes any retail merchant guilty of a misdemeanor who shall fail to make report and pay the tax prescribed in the Act, with a penalty of $1,000.00 fine, and, if the merchant is an individual, he may be imprisoned in the county jail for not exceeding six months, or both so fined and imprisoned. It is provided that such penalty shall be in addition to the two 20% penalties provided in Section 5.

Section 9 of this Act provides that one-half of all taxes collected thereunder "shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of said Board." And the other one-half "shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth." The Act contains no provision to segregate or hold any of the taxes collected in order to repay or refund taxes illegally assessed.

Section 10 of the Act is the section under which the Court below held that the appellants had an adequate remedy at law. We therefore quote this section in full:

> "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the

Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

BILLS OF COMPLAINT.

The Stewart Bill for present purposes is typical of them all. It sets out the challenged Act and the grounds of attack upon it, presenting pertinent facts to show the situation of the parties and the designed discrimination effected by the Act in its practical operations. In view of the fact that all the Bills of the four appellants are in substance and in fact the same, we will not refer to the Levy, Penney and Kroger Bills except when necessary to point out some particular feature. The Bill recites that the Stewart Company operates a large department store in Louisville. It has no other store. Its gross sales for the taxable portion of 1930 amounted to $3,209,717.39. The challenged Act levies upon it a so-called license tax of $23,848.06 upon its sales for the year 1930, and approximately $71,500.00 for the years 1930, 1931 and 1932, the taxes accrued to date.

The Levy Bros. Bill sets forth that it conducts in Louisville a single store, selling at retail men's clothing and related articles in various departments. It is a partnership. Its taxable sales for the year 1930 amounted to $1,253,389.07 and the tax exacted of it by the Act is $5,449.28, or a total of approximately $16,500.00 for the three years' taxes now accrued.

The Penney Bill recites that it is a corporation and operates twenty-one stores, retailing dry goods, shoes, clothing, in cities of the third and fourth classes in Kentucky. Its 1930 taxable sales amounted to $1,854,174.03, upon which the Act levies a tax of $11,591.75, less minor

credits, or a tax of approximately $35,000.00 accrued to date.

The Kroger Company Bill recites that it is a corporation, conducting 263 retail grocery stores in cities and towns of Kentucky, principally in the larger cities. Its 1930 sales are approximately Twelve Million Dollars and the tax under the challenged Act amounts for the year 1930 to $113,050.00. The tax under the Act for the three years accrued as to the Kroger Company amounts to approximately $339,150.00.

The four Bills of Complaint set forth four different classes of retail merchants aggrieved by the challenged Act. Each sues on behalf of its class, as shown by the Bill and by the Court's order in each case. They present a fair cross-section of the retail business in Kentucky—especially for comparison with competitors in various cities and towns, who pay no tax, or a trifling amount under the challenged Act. Thus, complainants and numerous others in like situation, many of them named in the record and protected by the restraining order, are taxed at exorbitant rates wholly out of proportion—even when measured by volume of sales—to the taxes levied upon competing stores.

The prayer of each Bill is for an injunction to restrain the collection of the tax levied under the challenged Act for the reason that the enforcement of the same constitutes an infringement of complainant's Federal constitutional rights. The Bills generally set forth important facts, figures and material, relevant to the complaints and the relief sought.

THE EVIDENCE.

Every allegation set forth in the several Bills of Complaint is supported by affidavits and in some instances by depositions. Counter affidavits were filed by the defendants contradicting some issues of fact. However, the main facts

alleged in the bills, and supported by affidavits and depositions, are not disputed of record. By agreement and Court order all the evidence or so much as is pertinent thereto, is filed in each of the cases.

The discriminatory features of the challenged Act are apparent upon the face of the Act itself. In practical operation, however, the vicious nature of the discrimination stands out so boldly as to challenge one's belief that such a taxing statute could be adopted in a land where there were any fundamental rights reserved to the people. Fortunately, we have in the record facts showing the actual operation of the Act. These suits and the temporary restraining order granted by the Court did not interfere with the operation of the challenged Act except insofar as these four appellants and the twenty-five or thirty other parties protected by the restraining order are concerned. With that exception all the merchants in the State of Kentucky coming under the provisions of this Act filed their returns and these returns were available for examination and analysis before the hearing was had in the Court below upon the motions for interlocutory injunctions.

On pages 148 and 149 of the Stewart record (pages 100-102 of the Kroger record) is an analysis prepared by the parties jointly showing the actual operation of the Act, which analysis shows these startling facts. 16,374 retail merchants filed returns. 16,353 of these merchants report sales of less than $400,000.00. The 16,374 returns filed report sales of over Two Hundred and Sixty Million Dollars. Only twenty-one of these merchants have sales in excess of $400,000.00. The 16,374 merchants, because of the minimum rate of 1/20th of 1% coupled with the exemption provided in Section 4 of the Act, only pay a combined tax of $65,656.20, which is an average tax of $4.01 each, or an average tax rate of 1/40th of 1% of the total sales, which brings out the following facts:

1. The Stewart Company is taxed over $23,000.00 upon Three Million Dollars in sales, nearly half as much taxes as are assessed against 16,374 merchants upon sales amounting to Two Hundred and Sixty Million ($260,000,000.00) Dollars.

2. Levy Bros. is required to pay almost $5,500.00 in tax upon One and One-Quarter Million Dollars in sales, while 16,374 other retail merchants with sales aggregating over two hundred times the sales of Levy Bros. are required to pay only $65,000.00 in tax.

3. The Kroger Company with sales of $13,000,000.00 is required to pay a tax of approximately $120,000.00, or twice the combined tax which 16,374 merchants are required to pay on $260,000,000.00 sales. This analysis also shows that 99.8% of the merchants of the State of Kentucky, making about 85% of the total sales, only pay combined one-half of the taxes assessed against the Kroger Company alone.

After the hearing in the Court below, by agreement of the parties, a supplementary tabulation of additional returns filed up to March 7, 1931, was made and attached to the record, which added 791 additional returns to the 16,374 previously referred to, and disclosed an additional tax liability of $4,498.31.

The discrimination shown by the figures included in the analysis of the returns filed, referred to above, is further emphasized if we add the 791 additional returns. The facts in evidence show that, including the tax liability of these appellants and the other merchants similarly situated and protected by the restraining order of the Court below, the total tax collectible under this Act in the year 1930 would not exceed $450,000.00. Of this amount only $70,154.51 would be paid by 17,165 retail merchants who filed returns, leaving about $380,000.00 to be paid by the merchants protected by the Court's restraining order. Nevertheless, these 17,165 merchants having about 85% of the total retail sales

of the State of Kentucky will only pay about 15% of the total tax levied under the challenged Act, whereas, about thirty merchants with total sales of about $48,000,000.00, or 15% of the total retail sales of Kentucky, would be compelled to pay about 85% of the tax under the challenged Act. Of these thirty merchants appellant Kroger, with sales of about 3½% of the total retail sales of Kentucky, would be required to pay over 25% of the total tax levied on all the retail merchants in the State of Kentucky.

We refer to the deposition of Shirley E. Haas, who helped to draw the Act and promoted its passage, when he stated (Stewart Record 95):

> "Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax."

SUMMARY OF ARGUMENT.

When an invalid taxing statute is enacted, there are three methods by which an aggrieved taxpayer may question the validity of the Act.

In the first place, he may refuse to pay the tax and subject himself to such proceedings as the State sees fit to employ in its collection and raise the question of invalidity in answer to the State's action. This is one remedy at law which would be open to appellants, but of which they cannot avail themselves because of the drastic civil and criminal penalties provided in the Act.

In the second place, the taxpayer may pay the tax under protest and bring an action at law to recover the money back on the ground that the Act was invalid. This remedy at law is not open to the appellants for a number of reasons, hereafter stated.

If the two methods at law outlined above are not available to appellants, they have no other remedy except to seek an injunction against the collection of the tax.

Since the Court below dismissed the Bills on the sole ground that the appellants have an adequate remedy at law available to them in the Federal Court and on that ground alone denied the motions for an interlocutory injunction, without considering whether or not the challenged Act, as shown in the Bills of Complaint and evidence submitted in support thereof, violated appellants' rights under the equal protection, due process and commerce clauses of the Constitution, we shall defer discussion of the question of the invalidity of the Act until after we have first presented the question of the right to challenge the Act by a suit in equity for an injunction.

I. APPELLANTS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INTERLOCUTORY INJUNCTION.

(a) Because the Act provides no way by which a taxpayer who has paid under protest, can obtain repayment if the Act is declared invalid. In such event, instead of giving the taxpayer his money back, he is required to take a so-called State warrant on a bankrupt fund out of which no warrant has been paid for over five years.

(b) Kentucky has not consented to be sued at law in the Federal Court.

(c) The only remedy provided in the Act is an action in mandamus against the State Auditor, which the Federal Courts cannot entertain.

(d) Appellants cannot refuse payment of the tax and subject themselves to suit because of the drastic civil and criminal penalties provided in the Act.

(e) The amount of tax assessed under the Act against the appellants is very large, causing serious finan-

cial embarrassment to require its payment. The right to recover back this tax if it should be paid under protest is so uncertain as to leave the appellants without a complete and efficient remedy except in equity.

(f) Appellants are entitled to maintain these actions as class suits under Equity Rule 38.

II. APPELLANTS ARE ENTITLED TO AN INTERLOCUTORY INJUNCTION.

(a) Under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813.

(b) Because the Act denies to appellants equal protection of the law.

(c) The Act violates the commerce clause of the Federal Constitution in that it imposes a tax upon sales of foreign-grown farm products and exempts like products raised in Kentucky, and in that it has directly taxed the sale of products moving in interstate commerce.

(d) The Act is confiscatory and constitutes an attempt to take the property of the appellants without due process of law.

ARGUMENT.

Point I-a.

The Act provides no way by which a taxpayer who has paid under protest can obtain repayment if the Act is declared invalid. In such event, instead of giving the taxpayer his money back he is required to take a so-called State warrant on a bankrupt fund out of which no warrant has been paid for over five years.

It is charged in the Stewart, Levy and Penney Company Bills (Par. 28), that, as shown by an official financial state-

ment issued by the State Treasurer of Kentucky as of January 1st, 1931,

> "The amount of money in the general fund on January 1, 1931, less minor accounts, was $12,565.81, as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds."

It is charged in the Kroger Bill (Kroger Rec. 29):

> "Should the plaintiff . . . . be successful in obtaining a judgment for the recovery of any taxes paid under protest, no provision is made for the payment of said judgment in money, but the remedy of the plaintiff . . . . would be limited . . . . to the issuance of a warrant . . . . on the Treasurer . . . . for the amount of said tax . . . . made payable only out of the General Fund of the State . . . . and . . . . that there are not sufficient funds in the general fund . . . . immediately or within a reasonable time to pay such warrants."

The allegations in the several Bills fully set forth the fact that the "general fund" of the State of Kentucky out of which a refund under this Act can only be obtained is insolvent and that there is no immediate or certain method by which a taxpayer could get a warrant paid even after he had conducted successful litigation to obtain one.

The defendants' motions to dismiss were equivalent to demurrers and as such admitted the truth of the allegations contained in the plaintiffs' Bills of Complaint.

Payne v. *Central P. R. Co.*, 255 U. S. 228, 232, 65 L. Ed. 598, 601;
Hill v. *Wallace*, 259 U. S. 44, 61, 66 L. Ed. 822-827;
National Remedy Co. v. *Hyde*, 50 Fed. (2d) 1066;
Hopkins Fed. Eq. Rules (7th Ed.), p. 198.

The evidence offered by the appellants, wholly uncontroverted by any evidence from the defendants, substantiates in every detail the allegations of the Bill of Complaint in this respect.

Appellants presented the affidavit of Arch B. Davis, Vice President of the Citizens Union National Bank of Louisville, Kentucky, who says (Stewart Rec. 91-92):

> "His experience in dealing with warrants against the General Fund has been that warrants are seldom paid in less than twenty months from the time when they are stamped 'Interest-bearing,' and he estimates that the *average time* within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included general warrants stamped interest-bearing on June 11, 1927, which would indicate that no warrants against the General Fund stamped since that date have been paid."

That the general fund of the State of Kentucky is insolvent at the present time; that it has been insolvent for a great many years; and that it will continue to be insolvent for many years in the future is a matter of common public knowledge in the State of Kentucky, and is evidenced by legislative declaration, judicial opinion and official messages of high public officers.

This Court has held in numerous cases that it will take judicial notice of public records and decisions of the courts, public acts of the Legislature (even when passed pending appeal), and reports of the Legislative committees, public commissions, and other public officers as to public matters affecting the State, even though the fact be otherwise pleaded without contradiction:

> *Abie State Bank* v. *Bryan*, 282 U. S. 765-778;
> *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158-164;

Jones v. *U. S.*, 137 U. S. 202-214-215-216;
Fourth Nat. Bank v. *Francklyn*, 120 U. S. 747-751;
Lamar v. *Micou*, 114 U. S. 218-223;
Muller v. *Oregon*, 208 U. S. 412-421.

The public records of Kentucky leave no doubt as to the long standing insolvency of the "general fund." The Legislature knows it and has so stated; the Governor knows it to be a fact, because he approved an Act of the Legislature admitting it. The Court of Appeals of Kentucky knows it, for it is set forth in their opinions. The voters of the State of Kentucky know that this fund is insolvent because time and again they have refused in referendum elections to provide for the payment of the public debt so as to make this fund solvent. The State Tax Commission, defendants in these actions, know that this fund is insolvent and that warrants drawn upon it cannot be paid within any reasonable time because they testified in a recent case that warrants were selling at a discount. See *State Budget Commission* v. *Lebus*, 244 Ky. 700.

In 1924 there were outstanding warrants against the Commonwealth of Kentucky amounting to Six Million Dollars, and in that year the Legislature of Kentucky adopted an Act to issue bonds in that sum, "to pay the outstanding warrants of the Commonwealth." A referendum was held on this bond issue and it was defeated at the election. This is a legislative recognition of the insolvent condition of the "general fund." See Acts of 1924, Ch. 122, pp. 436-444.

Again in 1926, the Legislature passed an Act providing for the issuance of bonds for the purpose of paying the outstanding warrants of the Commonwealth, which was likewise defeated on a referendum. See Acts of 1926, Ch. 13, pp. 85-89.

The Legislature of the State of Kentucky, in 1932, again undertook to discharge the public debt and retire the un-

paid warrants of the State by an issue of bonds, by an emergency act to take effect without a vote of the people, and in this Act admits that no State warrant has been paid since July 5, 1927; admits that "there is no money in the Treasury . . . . to pay the indebtedness evidenced by said warrants, or any part thereof," and admits that there is "now no provision of law to enable persons holding State warrants to obtain payment thereof." We refer to Acts of 1932, Ch. 20, pp. 119-123.

This Act is entitled:

> "AN ACT authorizing the funding of certain indebtedness of the Commonwealth of Kentucky, *which is evidenced by outstanding state warrants,* by the issuing of funding bonds, and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby," etc.

This Act contains a lengthy preamble reciting:

> "WHEREAS, There are now outstanding state warrants of the Commonwealth of Kentucky beginning with Warrant Number A49, dated July 5, 1927, and including all *unpaid* interest bearing warrants *issued since said date,* excluding warrants against the State Road Fund, which were duly and regularly issued by the Auditor of Public Accounts and stamped 'Interest bearing' by the State Treasurer, ... *and which warrants are now outstanding* and the indebtedness evidenced thereby unpaid, together with the interest accrued thereon at five (5%) per cent per annum from the respective dates of stamping thereof, less interest payments which have been made thereon; and
>
> "WHEREAS, *There is no money in the state treasury,* after reserving a sum sufficient to pay the necessary operating expenses of the Commonwealth for the remainder of the *current* fiscal year, *to pay the indebtedness evidenced by said warrants, or any part thereof;* and

"WHEREAS, Property values have greatly depreciated, thereby reducing the revenues and anticipated revenues of the Commonwealth; and

"WHEREAS, It is deemed by the General Assembly to be for the best interest of the Commonwealth that its budgets be balanced, and that the current revenues of each fiscal year applied to the payment of current expenses of the fiscal year; and

"WHEREAS, *Some of said warrants have been issued and outstanding for approximately 5 years;* and

"WHEREAS, It is deemed by the General Assembly to be necessary and advisable that the indebtedness of the Commonwealth evidenced by said warrants be funded by the issuance of bonds of the Commonwealth of Kentucky maturing serially over a period of twenty years, *in order that said indebtedness may be paid* without *unduly burdening* the taxpayers or *impairing the credit* of the Commonwealth and without *unnecessarily limiting* the ability of the Commonwealth to maintain its ordinary and necessary governmental functions, and so as to make it possible and practicable that hereafter all expenses and obligations of the Commonwealth may be paid from current funds during the fiscal year in which created, thereby obtaining services, materials, and supplies for the ordinary and necessary governmental functions of the Commonwealth of Kentucky on the most favorable terms. Now, therefore,"

Following this preamble is an enactment in six sections, the purpose of which is to acknowledge the indebtedness evidenced by the warrants and to fund same in the form of bonds payable in installments of not more than one million dollars annually prior to 1948, and not more than two million dollars annually from 1948 to 1952, inclusive.

Section 1 provides, at its end (p. 122):

"The proceeds of the sale or sales of such bonds shall be paid into the state treasury into a special fund and held in trust *for the sole purpose* of paying the indebtedness evidenced by said warrants."

Section 2 levies an annual tax in amounts sufficient to pay the interest and principal to become due in each fiscal year, for the sole purpose of paying such principal and interest on account of said bonds.

Section 6 provides as follows:

> "For the reasons set forth in the preambles hereof and for the further reason that *there is now no provision of law to enable persons holding state warrants to obtain payment thereof* an emergency hereby is declared to exist and this act shall take effect immediately upon its passage and approval by the Governor."

This Act in its entirety was held unconstitutional by the Court of Appeals in *State Budget Commission, et al.*, v. *Lebus, et al.*, 244 Ky. 701-714, on the ground that the Act violates the constitution forbidding the State to contract debts in excess of $500,000 without submitting the question to the vote of the people. The Court of Appeals in this opinion admits that in January, 1932, there were more than Thirteen Million Dollars of unpaid warrants outstanding. We quote from the opinion of the Court of Appeals as follows:

> "When the General Assembly convened on the first Tuesday in January, 1932, *there were in existence auditor's warrants*, indorsed by the state treasurer as interest bearing, aggregating more than $13,000,000. By Senate Bill No. 454, adopted by the General Assembly at its 1932 session, and approved by the Governor, these warrants were recognized as debts of the commonwealth, and their payment was provided for by the issuance and sale of bonds by the State Budget Commission, to the amount of $14,000,000." (P. 703.)
>
> "It cannot be assumed, however, that the owners of the warrants at the time they surrendered their respective claims against the commonwealth and accepted, in lieu of them, the warrants, anticipated they

would be coerced *to retain them indefinitely* because of the failure or refusal of the Legislature, year after year, to provide funds for their payment. *It cannot be doubted that such nonaction of the Legislature is in a sense a degree of repudiation.*" (P. 710.)

"Lastly, it is insisted that without the issuance and sale of bonds as provided for by Senate Bill 454, *the outstanding auditor's warrants will depreciate in value, the credit of the state will be unduly affected, and the expenses of the state government cannot be defrayed.* This argument with propriety might be addressed to the Legislature, but with the court it is not to be considered. We are deciding a question of *power* only." (P. 714.)

It thus appears, since these cases were submitted on February 14, 1931, the deficiency in the General Fund has increased from approximately $10,000,000 to $14,000,000. The Legislature and the Governor in the 1932 Bond Act *so stated* and further declared the State can with difficulty find revenues sufficient merely to carry on its ordinary governmental operations or to prevent even greater impairment of its financial credit. It has no present hope of reducing its outstanding warrants.

The record in the case of *State Budget Commission* v. *Lebus, supra,* contains the depositions of two of the defendants in these cases, who are members of the State Tax Commission. One of the defendants, Selden R. Glenn, testifying under examination by the Assistant Attorney General who is conducting the defense of this case, states that "the warrants on the market today are worth 87c to 88c," and that there is not a ready market for them at any price, and further, that "if something isn't done to relieve the situation, the warrants before September will sell at 75c."

In the light of the allegations in the Bills of Complaint fully supported by evidence, with reference to the warrants issued on the public funds, and the state of the "general

fund," let us examine Section Ten of the challenged Act and see if the remedy therein provided for a taxpayer who has paid under protest is as "certain, complete, prompt, practical and efficient to attain the ends of justice as that in equity." If not, equity jurisdiction exists under the facts shown in this record.

C. B. & Q. R. R. Co. v. *Osborne*, 265 U. S. 14-16;
Risty v. *C. R. I. & P. Ry. Co.*, 270 U. S. 378-388;
Henrietta Mills v. *Rutherford*, 281 U. S. 121-126.

Section Ten does not give to a taxpayer a right to get his money back. It says that he may "*at any time within two years from the date of such payment, sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment.*"

Does he get his money back if he wins the suit? No. Section 10 says:

> "If it is *finally* determined that the tax was wrongfully collected, it shall be the *duty* of the auditor to issue his warrant on the Treasurer."

Does he get his money back if he wins the suit and gets the warrant on the Treasurer? No. Section 10 directs that the Treasurer pay the warrant out of the "*General Fund.*" The General Fund, as we have seen, is bankrupt. What can the taxpayer do with these warrants? To use the language of the Court of Appeals they are "*coerced to retain them indefinitely,*" which again using that Court's words, "is in a sense a degree of repudiation."

Section Ten does not give to a taxpayer any greater or different right than what he had under the general laws of Kentucky. Under Section 162, Kentucky Statutes, it is provided that:

> "When it shall appear to the Auditor that money has been paid into the Treasury for taxes when no

> such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

It is therefore submitted that without Section Ten, the Auditor not only has the authority but that it is his duty to issue a warrant for the payment of taxes illegally collected. It is also well settled in Kentucky that if the Auditor refuses to issue a warrant, repaying taxes illegally collected, the taxpayer's only remedy is by way of an action at law in mandamus to compel him to perform his duty by drawing the warrant and this is true under Section 162 of the Kentucky Statutes, or under Section Ten of the challenged Act. *Coleman, Auditor,* v. *Consolidated Realty Co.*, 239 Ky. 788.

The taxpayer is a long way from getting his money back when he gets a warrant issued by the Auditor. But when he gets the warrant issued by the Auditor, the remedy provided for him in Section Ten is at an end for the reason that, notwithstanding the fact that Section Ten provides the Treasurer shall pay such warrant out of the "general fund" of the State, under the general laws of Kentucky, the State Treasurer is not bound to issue his check or to pay the warrant unless there is money in the particular fund upon which it is drawn, available for its payment according to law. The State Treasurer is strictly limited in his power to draw a check upon State funds by Section 4688, Kentucky Statutes, which provides:

> " . . . . and no such check shall be given by the Treasurer even though the Auditor issues a warrant therefor, unless the law under which the money may be claimed expressly directs and orders that it shall be paid out of the public treasury."

Section Ten specifically designates that the Treasurer shall pay the warrants out of the "general fund" of the

State. If the money is not in the "general fund," the Treasurer cannot be made to pay it, and the courts cannot, by mandamus, or any other way, compel him to pay it, as was held in *Bosworth, State Treasurer*, v. *Shuck*, 118 Ky. 458.

Section 4688a-1, Kentucky Statutes, provides that the Treasurer shall receive and redeem warrants issued by the Auditor,

> " . . . . if there be sufficient money in the treasury *appropriated for that purpose.*"

Section 4688a-2 provides:

> "That when Auditor's warrants are presented to the Treasurer for redemption . . . . and the funds *appropriated for the purpose* for which the said warrant was issued *are exhausted*, the Treasurer shall endorse thereon the date of its presentation, with the words 'No funds with which to pay this warrant, and it bears 5 per cent. interest from this date until called in.' "

Section 4688a-4, Kentucky Statutes, provides:

> "The Treasurer may, whenever there are funds in his hands amounting to as much as fifty thousand dollars ($50,000.00), *subject to the payment of outstanding warrants*, call for such number of warrants *by serial number*, which, in the aggregate, *do not exceed the amount of money on hand*, for the purpose of redeeming them. . . . The call of the Treasurer shall be published by him for ten consecutive days in a daily newspaper published in this state, and no warrant so called in shall bear interest after the expiration of said ten days' publication. Nothing herein, however, shall prevent the payment by the treasurer of said warrants due *according to the date of issue*, if presented without awaiting such publication."

These statutes are construed by the Court of Appeals and the Attorney General (Opinions of the Attorney Gen-

eral—1928 Compilation, p. 466) as requiring the Treasurer to pay the warrants according to their serial numbers and dates of issue.

Rhea, Treasurer, v. *Newman*, 153 Ky. 604, 618.

In this case, the Court construed the statutes above cited, governing the Treasurer in the payment of warrants drawn upon him by the Auditor of Public Accounts, and said (p. 618):

> "It is the duty of the Treasurer to pay outstanding warrants *in the order they were issued*, and as money available for the purpose reaches the treasury. This practice *insures fair treatment* of all, alike."
>
> (Reaffirmed in *Bosworth* v. *State University*, 154 Ky. 370-373.)

The above cited case of *Bosworth, State Treasurer*, v. *Shuck*, illustrates just what kind of adequate remedy at law appellants would have under Section Ten of the challenged Act. Shuck was a State employe. There was due him $1,875.00 unpaid salary. The Auditor refused to issue a warrant to Shuck because the funds for the payment of his salary were exhausted. Shuck thereupon brought suit against the Auditor under Kentucky Statute Section 162 in mandamus to compel the Auditor to draw a warrant on the State Treasurer. Shuck won this law suit. The Auditor was compelled to issue the warrant on the State Treasurer. Shuck presented his warrant to the State Treasurer who refused to issue a check because there were no funds available in his hands for that purpose. Thereupon, Shuck brought another mandamus suit, this time against the State Treasurer to compel him to issue a check upon the public funds in his custody. The lower Court decided in favor of Shuck and ordered the Treasurer to issue the check, but the

Court of Appeals reversed the judgment of the lower Court and held that the courts could not compel the State Treasurer to draw a check upon public funds in payment of a warrant, when there were no monies in the fund upon which the warrant was drawn, notwithstanding the fact that the same Court had previously compelled the Auditor to issue the same warrant. The Court at page 462 said:

> "Ordinarily, when the law recognizes the validity of a claim against the State, it is payable out of *any funds* in the treasury *not otherwise* appropriated, *but a wholly different rule prevails where a claim against the State is payable only out of a specific appropriation, which has been exhausted.* When this state of case is shown to exist, the courts *cannot by mandate* require the *Auditor to issue* a warrant for the claim, *or the Treasurer to pay it.*" (Citing authorities.)

In the light of the foregoing facts therefore, what is the practical remedy given to the appellants under Section Ten? The money which appellants pay under protest is immediately expended for other purposes. The fund, out of which the warrant which he may get in an action at law is to be paid, is exhausted, and no provision for replenishing the fund is in existence. All that the appellants would get would be a warrant which cannot be collected until such uncertain time in the future, if ever, when provision is made for the payment of the public debt. This remedy is not certain for the reason, as we have seen, that the Commonwealth of Kentucky, in 1924, in 1926 and in 1932, refused to recognize or discharge this public debt. Can it be said that the remedy is certain when the Commonwealth of Kentucky has steadfastly refused to pay outstanding warrants since 1924? Can it be said that the remedy is certain when it is a fact, as is shown by the pleadings and the evidence in these cases, that no warrants have been paid since the year 1927, and that there are no funds in the Treasury

now, and none provided for the future payment of such warrants, if at all?

The Court of Appeals of Kentucky has held in Kentucky Statutes, Carroll's Ed. 1930, Sec. 4688a-4; *Rhea, Treasurer,* v. *Newman,* 153 Ky. 604-618; *Bosworth, Auditor,* v. *State University,* 154 Ky. 370-373, that the outstanding warrants shall be paid by the Treasurer in the order issued for the purpose of insuring fair treatment to all. So, the most that could be obtained by the appellants in the way of an adequate remedy at law under Section Ten of the challenged Act would be to get a warrant, which could not be paid until over Fourteen Million Dollars in previous warrants have first been discharged, with no funds on hand and no provision at law for the discharge of any of such warrants.

The lower Court in its opinion (Stewart Rec. 249), states:

> "It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate."

The Court then says:

> "But no such unreasonable delay is indicated."

We submit that the Court misinterpreted the allegations of the Bill and the evidence in this latter statement. How can it be said that "no such unreasonable delay is indicated" in view of the uncontradicted facts in the record as to the past, present, and probable future condition of the "general fund," out of which the warrants obtained under Section Ten can only be paid?

The facts in the record show as heretofore stated, page 11, that the challenged Act, a revenue measure, imposed a total tax upon all the retail merchants in the State of

Kentucky of approximately $450,000.00 in the taxable year 1930, and of this amount the twenty-five or thirty merchants, in whose behalf these actions were instituted, would be required to pay almost $400,000.00 of this tax; the remainder, about $65,000.00, to be divided among the other 17,000 retail merchants of the State. The revenue under this Act is paid out immediately under Section 9 thereof, one-half t be used in re-building the State penal and charitable institutions and the other half in paying off the public debt. The Act expressly requires that the Auditor having taken complainants' money for the State shall apply it for the specific purposes stated in Section 9. As a result, half of every dollar which the appellants pay under the law, which we must not forget constitutes about 85% of the total tax collectible under the Act, goes to pay an old warrant against the "general fund" that someone else has been holding for years, while waiting for the legislature to provide taxes for its payment. The other half goes to rebuild prisons and asylums.

This statute, expressly limiting the taxpayer to recourse against a fund not augmented by the exactions from him, is wholly without precedent in the legislation of Kentucky, or any other State, so far as we have been able to learn. In actual operation, it is designed to encumber and delay, if not to defeat the refund it professes to authorize.

A provision somewhat similar, but far more honest and effective, is contained in a Kentucky statute levying for the benefit of the public road fund an excise tax on sales of gasoline. That statute, however, differs from the challenged Act in that its Section 9 (Ky. Stat., Carroll's 1930 Ed., No. 4224b-9) provides that the refund shall be made by the Treasurer "out of the public road fund of the State." In other words, the refund is allowed out of the fund augmented by the tax, so that it might be assumed that money will be on hand and available to make the re-

fund. This is true of statutes construed by this Court in cases like:

Matthews v. *Rodgers*, 284 U. S. 521-528;
Stratton v. *St. L. & S. W. R. R.*, 284 U. S. 530-533.

Not so under Section Ten. Hence, it is practically impossible, under the challenged Act, for a taxpayer to realize anything upon any refund within any reasonable length of time.

(b) Kentucky has not consented to being sued at law in the Federal Courts.

The eleventh amendment of the Federal Constitution provides that the judicial power of the United States shall not extend to any suit at law against a sovereign state. An action by a taxpayer to recover taxes previously paid, is a suit against a state and comes within the prohibition of this amendment. This is true, although the suit is in form an action against a state officer. *Smith* v. *Reeves*, 178 U. S. 436; *North Carolina* v. *Temple*, 134 U. S. 22; *Chandler* v. *Dix*, 194 U. S. 590.

While this immunity from suit may be waived by the state, such waiver must be clear and explicit. Section 231 of the Kentucky constitution provides:

> "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

This provision is not self-executing. An act of the General Assembly is necessary to create a waiver. Such waiver must be clear and explicit. "Statutes in derogation of the sovereignty of the state must be strictly construed." *Smith* v. *N. Y.*, 227 N. Y. 405, 125 N. E. 841.

Section Ten, neither in terms, nor by implication, contains any assent to an aggrieved taxpayer's suing the state of

Kentucky in the Federal Courts. In *O'Connor* v. *Slaker*, 22 Fed. (2d) 147 (C. C. A. 8), the Court considered the immunity of Nebraska from suit and said, at p. 151:

> "We find no statute, however, of Nebraska, expressly consenting in terms that the state may be sued in the Federal courts by a citizen of another state."

A state's consent to be sued in the Federal Court will not be implied from its consent to be sued in its own Courts. *Chandler* v. *Dix*, 194 U. S. 590; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151; *Highway Commission* v. *Utah Co.*, 278 U. S. 194.

The authorization contained in Section 10 to bring suit against the State contains no provision for suit in the Federal Courts and in the absence of such a provision the statute must be construed as an authorization to sue in the State Court.

In *Smith* v. *Reeves*, 178 U. S. 436, at page 445 the Court declared:

> "In our judgment it was competent for the state to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the State Board, *the condition that the suit be* brought in one of its own courts."

We submit that this is the situation under Section 10 of the Kentucky law.

As stated before, Section 10, although it provides for an action at law against the state for recovery of the money paid, does not provide where this action shall be brought. We are left to other Kentucky decisions and legislative provisions of the Court of Appeals of Kentucky for a proper determination of this question.

The action provided for by Section 10 is a suit against the Auditor of Public Accounts, that is, an action against an officer of the State.

Section 63 of the Kentucky Civil Code of Practice provides that actions must be brought in the County where the cause of action or some part thereof arose when the suit is brought "against a public officer for an act done by him in virtue or under color of his office." The collection of the tax is made by the Auditor in virtue or under color of his office and the suit against him must be brought in the county where the action arose. When the Auditor fails or neglects to issue his warrant on the Treasurer in favor of the person entitled to such a warrant a cause of action arises in favor of that person. The Auditor's office is in the State Capitol, located at Frankfort, in Franklin County. The action arises at the place *where* the Auditor fails to issue his warrant, namely, in Franklin County.

In *Commonwealth* v. *Morrell Refrigerator Car Co.*, 129 Ky. 738, the Court of Appeals of Kentucky had under consideration the failure of a corporation to make certain reports under Kentucky Statutes 1903, Section 4087. This Section made the failure to file such reports a misdemeanor. The question involved was whether the prosecution for this misdemeanor should take place in Carlisle County where the company had its principal place of business, or in Franklin County. The Court held that the cause of action arose in the county where the corporation failed to file its report, namely, Franklin County, and that because of Section 63 of the Code of Civil Practice the action should have been brought in that county.

The remedy provided by Section 10 is the right to file an action in order to require the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky.

Section 340a-2, Carroll's Kentucky Statutes, provides that the Circuit Court of Franklin County shall have jurisdiction of "all claims against the Treasurer allowed and approved by any Court in this Commonwealth, to any officer

of the Commonwealth, or to any person whatsoever." In construing this section the Court of Appeals in the case of *Greene* v. *Wolf*, 175 Ky. 58, held that the Franklin Circuit Court was invested with the *exclusive* jurisdiction of proceedings to compel the Auditor to pay claims against the State. On page 61 of its opinion the court said:

> "When we look at the purpose of the section (Ky. Stat. No. 340a-2) we have but little difficulty in concluding that it was the intent of the Legislature to confer exclusive jurisdiction upon the Franklin Circuit Court in all proceedings against the Auditor to compel him to issue his warrant against the treasury."

Although Section 10 does not state where the action for the recovery of the money could be maintained in the event the money was paid under protest, the Legislative acts and decisions of the Court of Appeals of Kentucky have definitely fixed the place of suit in the Circuit Court of Franklin County. All that we have, therefore, is an authorization to sue the State of Kentucky in its state courts. The complainants, therefore, would have a perfect right to appear in the Federal Court but have not been granted the right to sue for the recovery of money so as to avoid the restriction of the Eleventh Amendment to the Federal Constitution. The complainants therefore do not have an adequate remedy at law in the Federal Court.

In *Risty* v. *Chicago Railway Co.*, 270 U. S. 378, the Court pointed out that the remedy afforded by the State statute was not available in the Federal Court and said at page 338:

> "The test of equity jurisdiction in a Federal Court is the inadequacy of the remedy on the law side of *that* court, and not the inadequacy of remedy afforded by the state courts."

Chicago Railway Co. v. *Osborne*, 265 U. S. 14; *Standard Oil Co.* v. *Atlantic Coast Line*, 13 Fed. (2nd) 633-635, are like decisions.

In *Smyth* v. *Ames*, 169 U. S. 466, at page 516, the Court said:

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled, upon any ground, to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

A recent decision, which is directly in point on many of the jurisdictional questions of this case, is *Southern Railway Co.* v. *Query*, 21 Fed. (2nd) 333. Plaintiff prayed for an interlocutory injunction to enjoin members of the South Carolina tax commission from enforcing an unconstitutional tax measure. At the first hearing, the Court dismissed the complaint. Upon re-hearing the Court's attention was called to the fact that there was no adequate remedy at law, because the only remedy given by the statutes of South Carolina was an action to recover the tax after payment under protest. Such action, the Court said, would be a suit against the state, which could not be brought in the Federal Court because South Carolina had only waived its immunity from suit in the state Court, and nowhere else. The entire opinion, upon re-hearing, is relevant to the questions under consideration here. Section 32 of the South Carolina tax act is similar to Section 10 of the Kentucky Act. In discussing this section, the Court said at page 344:

> "There can be no doubt but that the remedy provided by section 32 is a suit against the state. The

object of the suit is to compel the state to perform its obligation to repay from state treasury taxes illegally collected and under the decisions of the Supreme Court of the United States, such a suit is a suit against the state. *Smith* v. *Reeves*, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; *Ex Parte New York*, 256 U. S. 490, 500, 501, 41 St. Ct. 588, 65 L. Ed. 1057; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 168, 169, 29 S. Ct. 458, 53 L. Ed. 742.

The Eleventh Amendment to the Constitution of the United States forbids a suit against a state, but the state may waive its immunity from suit, and when it does waive its immunity and consents to be sued in its own courts, this does not constitute a consent to be sued in a federal court. *Smith* v. *Reeves*, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; *Chandler* v. *Dix*, 194 U. S. 590, 24 S. Ct. 766, 48 L. Ed. 1129; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 168, 172, 29 S. Ct. 458, 53 L. Ed. 742.

In *Murray* v. *Wilson Distilling Co., supra*, the Supreme Court used the following language: 'And it is elementary that, even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States,' citing *Smith* v. *Reeves, supra; Chandler* v. *Dix, supra*. . . .

While these principles are firmly established, it is, however, equally well-settled that the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. In other words, if a suitor has sufficient ground to invoke the jurisdiction of a federal court of equity, a remedy at law in the state court which is not available in the federal court is not sufficient to deprive a federal equity court of jurisdiction. *Smythe* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *C. R. I. & P. R. R. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641."

(c) The only remedy provided in the Act is an action in mandamus against the State Auditor, which the Federal Courts cannot entertain.

Section Ten provides for an action at law against the Auditor of Public Accounts. There is no statement as to which form this action at law should take. We are again relegated to other Kentucky legislative acts and decisions in order to determine what form of action must be brought.

The Commonwealth of Kentucky has provided by Section 162 of Carroll's Kentucky Code an authorization for recovery of money paid into the State Treasury for taxes when no such taxes were due. When this situation arises it becomes the *duty* of the Auditor to issue his warrant on the Treasury for the money so improperly paid. If the Auditor refuses to issue his warrant, the only method known to the law for enforcing the duty laid upon him by Section 162 is to bring a common law action of mandamus against him to compel him to comply with his duty. This is the procedure which has been uniformly invoked under this section. *Louisville Gas and Electric Company* v. *Bosworth*, 169 Ky. 824, 185 S. W. 125; *Green* v. *E. H. Taylor, Jr., & Sons*, 184 Ky. 739, 212 S. W. 925; *Craig* v. *Security Producing and Refining Company*, 189 Ky. 565; *Craig* v. *Renaker*, 201 Ky. 576, 257 S. W. 1018.

The language in Section 10 is similar to the language in Section 162. In both places there is a declaration that it shall be the *duty* of the Auditor to issue a warrant.

Section 477 of the Civil Code of Practice of Kentucky defines "mandamus" as follows:

> "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and

> is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

The only remedy available to the taxpayer under Section 10 being an action of mandamus it cannot be maintained that payment of a tax under protest, coupled with suit to recover in accordance with Section 10, constitutes an adequate remedy at law available in the Federal courts. An action of mandamus cannot be maintained in the Federal Court. *Graham* v. *Norton*, 82 U. S. 427.

In *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109, the syllabus reads, in part, as follows:

> "Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an ordinary action for the purpose of securing relief by the writ, although the relief sought concerns an alleged right secured by the Constitution of the United States."

Additional authorities in support of this general rule are: *Knapp* v. *Lake Shore Ry. Co.*, 197 U. S. 536; *Rosenbaum* v. *Bauer*, 120 U. S. 450.

If the Kroger Company were compelled to pay $339,150.00, the approximate tax now due, under protest, to the Auditor of Public Accounts and then endeavored to recover back the payment in an action at law in the Federal Courts, its right to recover would be denied on the grounds that its action was a suit against the sovereign State of Kentucky, prohibited by the eleventh amendment, and that the only remedy provided by Kentucky was an action in mandamus against the Auditor of Public Accounts, to compel him to draw his warrant upon the treasurer of the state, a remedy not cognizable in the Federal Courts. For these reasons Kroger and all other taxpayers entitled to invoke the jurisdiction of the Federal Courts and to maintain an action in

the Courts of the United States would be relegated, if it were compelled to proceed at law, to an action in the Circuit Court of Franklin County, Kentucky, by way of mandamus against the Auditor of Public Accounts. It is too clear for extended argument, that this is not an adequate and complete remedy at law in the *Federal* Courts and that the plaintiffs in the present cases, are entitled to invoke the equitable jurisdiction of this Court.

(d) Appellants cannot refuse payment of the tax and subject themselves to suit because of the drastic civil and criminal penalties provided in the Act.

As previously stated in this brief, page 6, the taxes assessed against these four appellants for the three years now in question, amount to almost a half million dollars. Section 5 of the Act provides a penalty of 20% for failure to file a report and an additional penalty of 20% for failure to pay without suit. If the appellants would resort to the remedy at law of refusing to pay the tax, and should they be defeated in litigation brought by the State to collect the tax, they would be subject to a penalty of almost $200,000.00 for the three years in question and, besides, in the Levy case, because it is not a corporation but a partnership, the individuals composing the partnership would be guilty of a misdemeanor punishable by fine and imprisonment under Section 7 of the Act.

These penalties provided by the Act are so drastic that a taxpayer dare not test the Act by permitting suit to be brought against him. The taxpayer is coerced by excessive penalties, into yielding to the provisions of the law for fear of the penalties.

Not only that, but Section 6 of the Act gives the state the right to seize the taxpayer's property by attachment and garnishment without the giving of a bond. Such dras-

tic penalties have been held so severe as to intimidate taxpayers from litigating, and hence to deny them the equal protection of the laws. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, at pp. 100 to 102; *Ex parte Young*, 209 U. S. 123; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150; same case, 157 Fed. 849, affirmed on this point in 212 U. S. 19; *Old County Trust Co.* v. *Seattle*, 271 U. S. 426.

(e) The amount of tax assessed under the Act against the appellant is very large, causing serious financial embarrassment to require its payment. The right to recover back this tax if it should be paid under protest is so uncertain as to leave the appellants without a complete and efficient remedy except in equity.

The Stewart Bill of Complaint alleges that the taxes which it would be required to pay under the Act will be a substantial portion of the capital invested by it and needed by it to carry on its business; that the payment of such tax will impair the ability of the plaintiff to operate its business in Kentucky and will possibly decrease the annual amount of business which it will be enabled to do. (Stewart Record, p. 37.) Similar allegations are in each of the other Bills.

At the time of the hearing of these cases in the lower Court one of the Judges asked counsel for appellant this question: "Why don't you pay the tax under protest and sue to get it back? Are you afraid?" Counsel for appellant answered: "We are afraid that we will never get it back. It is not clear just how we are going to get it back. There is so much doubt about it that we are afraid to take the risk, and besides, the amount of tax which we have to pay is so large that it is a great burden on us to pay it when it is so apparent that the Act is invalid."

In these critical financial times when even the greatest of our business institutions are finding it difficult to meet

maturing obligations, and when our great semi-public corporations, like railroads, life-insurance companies and national banks are imploring the aid of the Federal Government to enable them to meet their current obligations, it is certainly out of tune with things to require these appellants to pay out almost a half million dollars under an Act such as this, if there is any doubt in the world about their right to get the money back with interest immediately if the Act is held invalid.

In *Raymond, Treasurer of Cook County*, v. *Chicago Union Traction Co.*, 207 U. S. 20, this Court recognized that a taxpayer in such a case as this presents grounds for equitable relief when the payment of the tax would render the taxpayer insolvent and subject its property to a levy which would interfere with the operation of its business. There is no allegation in the Bills here or in the evidence that the tax exacted from these appellants would render them insolvent, but there are allegations in the Bill supported by evidence in the record that the payment by these appellants of almost a half million dollars in taxes would seriously embarrass them in the operation of their business. Likewise, the Act itself gives the State a right to levy upon all the property of the appellants to collect the tax. We submit, therefore, that the appellants because of the amount of tax involved will suffer certain and irreparable injury, with grave doubt of the right within any reasonable time to recover back the payments if the tax is held invalid. On the other hand, the State is not inconvenienced in any degree. It should not want to collect and disburse taxes until its right to do so is beyond question. And, besides, it is amply protected against every inconvenience and loss by the bond which a court of equity would require of the appellants.

(f) Appellants are entitled to maintain these actions as class suits under Equity Rule 38.

Each bill contains averments necessary to a "class suit" under Equity Rule 38 (see Stewart, 29-30, Kroger, 5). Upon these averments the Court made the following order (Stewart, 39):

> "On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930."

Numerous other taxpayers came in under these orders. For example, in the Stewart bill (Stewart, 30) twelve others are specifically named, and they are protected by the restraining order (Stewart, 42-44, 246-247).

Likewise in the Kroger suit, forty-eight such taxpayers are specifically named in the Court's orders as protected thereby (Kroger, 72, 84, 96). No objections were made or exceptions taken to these orders.

In the recent case of *Matthews* v. *Rodgers*, 284 U. S. 521, the Court held that generally the jurisdiction of equity to avoid multiplicity of actions does not extend to cases where there are numerous parties plaintiff and the issues between them and the adverse party are not necessarily identical. In that case, however, the plaintiff was not suing as a representative of a class under Equity Rule 38.

Equity Rule 38 provides as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

In *Gramling* v. *Maxwell*, 52 Fed. 2nd 256, the Court had under consideration an action brought to enjoin a state statute under Equity Rule 38. The Court declared, in speaking of this statute: "Whatever may have been the rule formerly as to the right to maintain a class suit of this character in the Federal courts, we think that since the adoption of the 38th Equity rule (28 U. S. C. A. 723) the right to maintain such a suit cannot be denied."

The four cases before the Court have been considered since their inception as having been brought pursuant to Equity Rule 38. We do not believe that there can be any question that they come within the definition of a class suit.

All of the parties in these cases, if they paid the tax, would be required to look for repayment to the insolvent general fund of the State of Kentucky. They have therefore a community of interest which binds them together in one class and gives the Court jurisdiction over an action brought by one on behalf of all the others.

Opinion of the lower court.

The lower Court reached the conclusion that the complainants were required to pay the taxes under protest and bring an action under Section Ten, if they claimed the taxing measure was unconstitutional. The Court disregarded the fact that Section Ten is an integral part of the taxing measure. There was no intention on the part of the legislature of Kentucky to provide a new method of suing

the State on questions other than those arising under the gross sales tax law. Section Ten would not have been enacted if the gross sales tax measure had not been passed. If the gross sales tax law is invalid the entire measure falls, including the provision for recovery contained in Section Ten. *Allen* v. *Louisiana*, 103 U. S. 80; *Hill* v. *Wallace*, 259 U. S. 44; *Williams* v. *Standard Oil*, 278 U. S. 235. As a result, the taxpayer is placed in the following position: If he pays the tax under protest and brings an action to recover it on the ground of the invalidity of the taxing measure in accordance with Section Ten, and if he proves the correctness of his contention, then as a result of having the law declared invalid he deprives himself of the only remedy provided by the legislature of Kentucky. At the same time that he proves his right to recover he destroys the section which operates as an authorization by the State of Kentucky to bring an action at law against it. As a result, he loses the right to sue the sovereign, and although he has proved his right to recover he is unable to secure a refund of the money paid under protest.

The gross sales tax law was newly enacted at the time complainants brought their action. No interpretation of the law had been made and insofar as the question of adequacy of remedy at law in the Federal Court or the procedure under Section Ten are concerned, no interpretation has been made up to the present time.

The same is true in regard to the question of priority of warrants to which the plaintiff would be entitled in case it paid the tax under protest and brought an action under Section Ten.

In the case of *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, the North Carolina Income Tax Law was assailed by a Bill in Equity. The state moved to dismiss the Bill (425)—"because there is under the laws of North Carolina a plain, adequate and complete remedy at law by which a

taxpayer may recover the amount of an illegal tax paid by him under protest."

Denying the motion to dismiss, the Court said:

> "Our attention has been called to several North Carolina cases and the statute bearing upon this contention. But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say the remedy at law is plain and adequate (citing authorities). We have therefore passed upon the merits."

The opinion of the lower Court fails to recognize the fact that Section Ten was recently enacted. The interpretation placed on the statute by the lower Court was its interpretation and not the interpretation by the Court of Appeals of Kentucky. The whole opinion gives one an impression that the lower Court attempted to construe Section Ten in such a manner that they would read into it an adequate remedy at law for the plaintiff. In other words, they tried to construct out of Section Ten an adequate remedy at law which did not exist. If the plaintiff accepted the decision of the lower Court, paid its money under protest and brought suit to recover, it was apt to be met with a different construction and the adequate remedy at law to which it was entitled would be denied it.

The presumption indulged by the lower Court in its opinion (Stewart Record p. 238) to the effect that it will not be presumed that the legal remedy provided was intended to be confined to the state Court is incorrect. On the contrary, the proper presumption is that a state cannot waive its immunity by inference, but can only do so by express language. *Smith* v. *New York*, 227 N. Y. 405, 125 N. E. 841; *O'Connor* v. *Slaker*, 22 Fed. (2d) 147.

The Court state that they conclude that the legal remedy provided by Section Ten was intended to be available

in the Federal Courts as well as in the state Court. This statement is made by the Court without taking into consideration the general Kentucky statutes which fix the venue in Franklin County.

The Court is incorrect in its argument in regard to interest which appears on page 242, Stewart Record. The warrants only bear 5% interest, while the legal rate of interest in Kentucky is 6%. The Court, at page 242, reaches the conclusion that even if the warrants are only salable at a discount, nevertheless the fact that interest is given eliminates the claim that the issuance of such a warrant does not give the plaintiff an adequate remedy at law. This argument is predicated on the theory that "so far as we are advised the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate." (Opinion p. 242, Stewart Record.)

In the case of *Hopkins* v. *So. California Telephone Co.*, 275 U. S. 393, the Supreme Court specifically states that the failure to provide for the payments of interest gives the taxpayer the right to go to equity even though the state permitted a suit to recover taxes paid.

The lower Court placed some reliance on the fact that the warrants are exempt from state and local taxation. (Opinion p. 242, Stewart Record.)

The Court fails to take into consideration the fact that Kroger is a corporation under the laws of the State of Ohio and that the situs for their taxation would be Ohio. Whether or not Kentucky exempts these warrants should therefore have no bearing on this case. In *Blodgett* v. *Silberman*, 277 U. S. 1, the Court held that bonds and warrants of indebtedness of the United States were choses in action and were subject to tax at the domicile. See also *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204, Syl. 1, in regard to certificates of indebtedness issued by a state being taxable at the domicile of the owner.

The lower Court is incorrect in its argument in regard to mandamus.

The lower Court admits that an action of mandamus is necessary in order to secure to the complainants the rights given by the Act and the Court also admits that an action in mandamus cannot be maintained in the Federal Court. The Court contends, however, that this particular action in mandamus is ancillary to the original relief sought. This forces plaintiff to take two actions where only one is needed in equity. As a result the lower Court recognizes that the plaintiff does not have as effective a remedy at law as it would have in equity. Furthermore, a judgment would only be prima facie evidence of a debt under Section 340 a-1, Carroll's Kentucky Code, and the complainant would have to prove its case twice in order to secure relief.

Section 340 a-1 of Carroll's Kentucky Code provides as follows:

> "That the order of any of the courts of this Commonwealth now authorized by law to approve and allow . . . . claims against the Treasury of any of the officers of the Commonwealth, or of other persons having claims against the Treasury, shall only be regarded as prima facie evidence of the correctness and legality of such . . . . claim; and such order shall in no case be treated as a judgment or be made conclusive against the state; but the auditor . . . . may . . . . refuse to pay, and may contest the same in the Franklin Circuit court . . . ."

If the claimant would secure an order in accordance with Section Ten, the Auditor might refuse to pay, and contest the claimant's right to recover in the Franklin Circuit Court. All that plaintiff is given by Section Ten, therefore, is a right to establish prima facie evidence of the legality of his claim. Bearing in mind that a remedy at law is one

which is certain, complete, prompt, practical and efficient to attain the ends of justice, it cannot be maintained that the remedy provided by Section Ten is sufficiently effective to constitute an adequate remedy at law.

In *Standard Oil Co.* v. *Atlantic Coast Line*, 13 Fed. (2d) 633, at 635, the Court declared:

> "It is well settled, however, that to constitute an adequate remedy at law, the remedy must be as complete, practicable and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity (citing authorities), and must be available to the plaintiff in a Federal court."

In *Davis* v. *Wakelee*, 156 U. S. 680, the Court held that where there was doubt as to the construction which a petition would receive in the state Courts, an equitable action was properly brought in the Federal Courts. We quote from the language of the Supreme Court at page 688:

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of suit. (Citing cases.) Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." See also *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282-287.

Even if the complainant would pursue the course provided by Section Ten of the challenged Act and would pay the taxes under protest and bring an action at law to recover the money paid on the ground that the statute was invalid, in which action complainant would be successful, it still would not have a certain remedy within the requirements of the rules laid down by the Supreme Court.

The lower Court in its opinion concedes our claim that a meaningless judgment would not be an adequate remedy at law.

In its opinion the Court states (p. 240 Stewart Record):

> "It may be conceded that if taxpayers obtain judgments under Section 10 and are compelled to wait an unreasonable length of time for their money the remedy at law given by this section would not be adequate."

Further in its opinion (Stewart Record p. 241) the Court states that the remedy at law "would not be full and complete unless the holders of judgments obtained under its provisions (Section Ten) could secure the reasonably prompt payment thereof."

In these statements the Court is in accord with the declaration of the Supreme Court in the cases of *Matthews* v. *Rogers*, 284 U. S. 521, and *Stratton* v. *St. Louis Railway*, 284 U. S. 530.

The lower Court reaches the conclusion that no such reasonable delay has been shown in the record. They state that the State of Kentucky is only two years behind in its payments. The record shows that no payments have been made on warrants for two and one-half years. This alone is an unreasonable length of time. However, the Legislature of Kentucky has indicated that no warrant has been paid for five years (Acts 1932, Chapter 20). We believe that a delay of five years in payment of money due under a warrant issued is an unreasonable length of time. It certainly gives the taxpayer no adequate remedy at law when there is a showing that there are no prospects of the State catching up in its payments. The insolvency of the fund out of which the complainants must hope to recover has

been shown in the Bills of Complaint and was admitted to be true by defendants' motions. We have, therefore, in the record sufficient allegations of special circumstances which show that a judgment would be meaningless and complainants are therefore entitled to proceed in equity. *Matthews* v. *Rogers, supra; Stratton* v. *Railway Co., supra.*

The lower Court indicated that it was not certain as to plaintiff's rights under Section Ten. This lack of certainty gives plaintiff a right to proceed in equity.

An examination of the lower Court's opinion shows that it was somewhat troubled by complainant's contention that the inability of the Commonwealth of Kentucky to pay warrants rendered the remedy provided by Section Ten inadequate. On the record complainants showed that no warrants had been paid for a long time and that outstanding warrants exceeded the funds in the State Treasury by $9,800,000.00. Although the Court did not make the statement, it realized that if the complainants were forced to wait until the $9,800,000.00 worth of warrants outstanding at the time the suit was filed were paid, the complainants would have to wait an unreasonable length of time. To justify its opinion the Court attempted to render an interpretation of the statute which would eliminate the necessity for such a long wait. The Court states (opinion page 240 Stewart record):

> "The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that Section is that such warrants shall be paid when presented if, there is sufficient money in the general fund to do so, even though there may be outstanding other and prior warrants against this fund."

Disregarding for the moment the fact that there is no basis for such an interpretation, we believe that this statement clearly indicates the uncertainty of complainant's remedy as provided by Section Ten. Let us assume that the complainants were satisfied with the lower Court's opinion and proceeded under Section Ten and were successful in securing a warrant on the State Treasurer. If complainants would present these warrants to the Treasurer there would be nothing to prevent him from refusing to pay them out of order, and in case plaintiff attempted to bring an action to coerce him into such an action a result different from that reached by the lower court might be arrived at by the Court of Appeals of Kentucky. In fact, we believe that there can be no doubt that such a different result would be reached in view of Section 4688a-4, Carroll's Code of Kentucky, and of the case of *Rhea* v. *Newman*, 153 Ky. 604, which holds that warrants must be paid in the order in which they are issued. The lower Court itself realizes the weakness of the statement quoted above. On page 241 (Stewart Record) of its opinion the Court said that although there was no express direction to pay warrants in the order they are issued "such is probably the fair inference to be drawn from language used in Section 4688a-4, Carroll's Kentucky Statutes, and the decision of the Kentucky Court of Appeals in *Rhea* v. *Newman*, 153 Ky. 604."

The Court indicates that if these warrants are not paid out of order the plaintiff would not have an adequate remedy at law. Its interpretation of the statutes is not binding on the Treasurer of the Commonwealth of Kentucky and its attempted explanation of the statute clearly brings this case within the language of *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, at page 426, where the Court declared:

> "The statute mainly relied upon is a recent one which appears not to have been construed and applied

> by the highest court of the state. In the absence of such decision you cannot say the remedy at law is plain and adequate. We have therefore passed upon the merits."

In the absence of any decision as to whether these warrants can be paid out of order, and in view of the law of Kentucky which says they must be paid in the order of their issuance, the complainants' remedy at law cannot be said to be plain and adequate. Consequently, the lower court should have passed on the merits.

In reaching the conclusion that warrants issued under Section Ten should be paid out of order, the court states:

> "It *seems* entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10, priority of payment over other outstanding warrants against the general fund." (Stewart Record page 241.)

The use of the word "seems" shows that there was some doubt in the court's mind. This term connotes doubt.

In *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, at page 296, the Court quoted from *Davis* v. *Wakelee*, 156 U. S. 680 at 688, and said:

> "It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.' "

In this case there is doubt as to whether plaintiff could ever secure payment of its warrants even if those warrants were to be paid out of order. But there is an additional doubt as indicated by use of the term "seems" by the lower court as to whether the warrants would be paid out of order. The remedy therefore is doubtful and the lower court should not have declined cognizance of the suit.

The lower Court's argument that legislature may enact a measure looking to the payment of warrants does not give complainants an adequate remedy at law.

In the Court's opinion (Stewart Record page 242) it states that the warrants of Kentucky are readily salable. There is nothing in the record to support this declaration. As a matter of fact, Kentucky warrants can only be sold at a discount. This fact, as we have previously pointed out at page 21 herein, is so widely known that this Court will take judicial notice of the situation.

In the record we have alleged that warrants have not been paid for a long period; that there are outstanding $9,800,000.00 worth of warrants in excess of the money in the Treasury needed for payment. In view of such a situation, it can be readily seen that the Court's declaration in regard to salability of warrants is absolutely incorrect.

At the bottom of page 242 (Stewart record) appears a declaration of the lower court that Kentucky has no bonded indebtedness and that it is entirely solvent. There is nothing in the record to support this statement and the lower Court has completely disregarded the fact that the holders of warrants can only hope to be paid out of a particular fund which is hopelessly insolvent.

The statement on page 242 above referred to, is followed by a declaration that the General Assembly of Kentucky has unlimited power to tax and that with this unlimited power the Court will not assume that an aggrieved taxpayer cannot recover within a reasonable time. The fact remains that the Legislature of Kentucky has recognized that holders of warrants have not been paid for five years. Further, the Court of Appeals of Kentucky has recognized that this situation amounts to virtual repudiation of the state's obligations. The Legislature has shown that it will not enact legislation in sufficient time to enable an aggrieved taxpayer to recover in a reasonable time.

In an attempt to construct for the complainants an adequate remedy at law which does not exist, the lower Court attempts to force the taxpayer to rely on the willingness of the State Legislature to enact some measure which will revitalize the general fund and enable the State Treasurer to pay past due warrants. This puts the taxpayer in a precarious position, because the Legislature may never be moved to pass such a measure. A taxpayer does not have an adequate remedy at law when his chance to recover is left to the whim of the legislature. Moreover, the legislature is without power to refund the debt by a bond issue without a vote of the people. *State Budget Commission* v. *Lebus*, 244 Ky. 701.

Furthermore, states have been known to repudiate their debts. The situation in Kentucky has been recognized by its Court of Appeals as tantamount to repudiation. A presumption contrary to that reached by the lower Court would be perfectly justifiable under present-day conditions when tax receipts are low and expenditures are high.

As an example of what the taxpayer may expect if he relies on the legislature to pass a taxing measure which would enable him to collect the outstanding warrants, we wish to refer to the action of the legislature in its last session. One of the first measures introduced in the lower House was an act to prohibit the issuance of any warrants unless sufficient money was in the State Treasury to pay the claim. This was House Bill No. 13 and was introduced by Mr. Frank Lebus. The measure was favorably reported by the Committee to which it was referred, but it was not passed. It manifested an intention to deprive the taxpayer of his right to a worthless warrant. If the measure had passed, the taxpayer would be in a position where, under the sales tax law, he would pay his money to the state, which money would be immediately expended by the state,

leaving the taxpayer with a right to sue for a warrant which the Auditor could not issue.

Although the measure did not pass, it is indicative of the state of mind of the legislature and clearly shows that the lower Court was incorrect in saying that the taxpayer could rely upon the unlimited power of the Legislature of Kentucky to tax.

Point II-a.

Appellants are entitled to an interlocutory injunction under the rule laid down in Ohio Oil Co. v. Conway, 279 U. S. 813.

In the trial of the four cases before the three-judge court both plaintiffs and defendants introduced *ex parte* affidavits in support of their contentions.

The United States Supreme Court, in the recent case of *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 814, 815, has definitely established the right of these plaintiffs, in an action brought pursuant to Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), to obtain an interlocutory injunction for the protection of their interests as taxpayers against the illegal claims sought to be asserted against them by the defendants, as set forth in the bills of complaint. The opinion *per curiam* in that case, in dealing with this very subject, says (p. 815):

> "Where the questions presented by an application for an interlocutory injunction are grave, and an injury to the moving party will be certain and irreparable if the application be denied and a final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by bond, the injunction usually will be granted."
>
> (Citing *Love* v. *A. T. & S. F. Ry. Co.*, 185 Fed. 321, 331-332.)

Commenting upon the application for an interlocutory injunction in that case, the Court said it was submitted on *ex parte* affidavits (pp. 814-815),

> "which are harmonious in some particulars and contradictory in others. The affidavits, especially those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined."

In the instant case the affidavits of the defendant are subject to the same criticism made in the *Conway* case.

In concluding its opinion in that case the Court said that the application for an interlocutory injunction should be granted upon terms requiring:

> (a) That plaintiff pay the tax fixed by the prior Act, which was not contested (whole tax contested here);
>
> (b) Give an adequate bond to pay the tax with interest and *without other penalty* exacted under the amendatory Act if it should be adjudged valid by final decree, and
>
> (c) Prosecute the suit with reasonable expedition to a final decree.

We believe that the above decision conclusively fixes the right of the plaintiffs to an interlocutory injunction upon the facts shown by the Bills of Complaint and the affidavits filed in support thereof.

(b) Appellants are entitled to an interlocutory injunction because the challenged act deprives them of the equal protection of the laws.

The discriminatory features of the Act are illustrated in various ways by the different cases which have been presented. The discrimination in the Stewart case has been shown by the fact that that Company with $3,000,000.00 worth of sales has to pay a tax which is one-half as large as that which 16,353 merchants pay altogether upon sales aggregating nearly 80 times the volume of Stewart's sales.

The discrimination in regard to Stewart is further illustrated by the fact that that Company is required to aggregate the sales in all of its departments for the purpose of determining its tax rate. Stewart's is a department store having seventy separate departments. Each department is in purpose and in fact a separate unit distinguished from the other departments in Stewart's and each is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department in Stewart's sells articles which have no relation to the articles handled in other departments. The annual sales in any single department do not exceed $400,000.00. The maximum sales in Stewart's departments are $250,000.00.

Each department in Stewart's competes with specialty stores in the City of Louisville which sell the same line of goods and in many instances the sales of a particular department in Stewart's are considerably less than the sales of a specialty store competing with Stewart's in the particular line of goods handled.

The Stewart record illustrates numerous examples of this situation. (Record page 70.) In spite of this, however, the competitors of the particular departments only have to pay at the rate of 1/20 of one percent and their total

tax is often wiped out by the exemptions they are allowed. In the case of Stewart's, however, each department has to pay at the rate of practically one percent, merely because the sales in that particular department are added to the sales of other departments which handle goods of a different character.

Because each department handles a different type of goods Stewart does not have the advantage of mass buying which was found to be a basis for classification by the Supreme Court in the case of *State Board of Tax Commission* v. *Jackson*, 283 U. S. 527. In the majority opinion in that case the Court declared:

> "The mass buying done by a chain store owner for a number of units selling the same goods is not comparable to the individuated purchasing of a department store for its grocery, its shoe, its truck, and each of its other departments. It is not to be expected that the management problems of stores, essentially separate and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a chain store owner operating an equal number of units all devoted to a single line of business."

The Supreme Court therefore has recognized the fact that a department store like Stewart's does not have the advantages which are claimed by counsel for defendant to be the basis for the classification. Since there is no basis for the classification the high tax rate imposed on Stewart's amounts to a deprivation of the equal protection to which it is entitled under the Federal constitution.

The purely arbitrary use of the multiplication table in fixing the varying rates of taxes above $400,000.00 is emphasized by the requirement that all sales of all stores and all departments associated under common management,

through stock ownership or otherwise, be aggregated for the purpose of determining sales volume. In other words, the rate of taxation is not based upon the volume of sales in a certain store or department handling related merchandise, but the sales made in one store or department are taxed at an ascending rate if, and solely because, the owner of that store or department owns other stores or departments. For example, the owner of a jewelry store is taxed on the sales of jewelry made therein at one rate, and if he also owns a retail coal store or automobile store, his jewelry sales are taxed at an entirely different rate. The tax in question forces the taxpayer to aggregate the sales of all enterprises in which he may have a controlling interest or which are under common management regardless of how dissimilar and unrelated the same may be. A merchant who owns or controls a candy store, a jewelry store and a piano store in three different cities having no relation to each other, one owned individually, one by stock control, and one as a co-partner, must nevertheless, aggregate the sales of all three for the purpose of taxation. There is no reasonable basis for such an arbitrary classification.

The illustrations are not fanciful. In the affidavit of Dann Byck (Stewart record 85) he says that Byck Brothers operate a store in Louisville and lease a department in the store of Wolf Wile Co. in Lexington, Kentucky. He says that whether the sales of this department are added to Wolf Wile sales or to the sales of affiant's Louisville store, the results are as follows:

> "If its sales are added to Wolf Wile's it will fall in the higher brackets and Bycks will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to the sales in Louisville then it increases Byck's sales and places it in a bracket where its tax approaches 1% and as a

> result this department would be subjected to a higher tax merely because Byck's operate a store selling a great many different items in a different city."

Byck Bros. & Co., Inc., is one of the parties protected by the restraining order. (Stewart record, page 246.)

The discriminatory features of the Act are further illustrated by the fact that Levy Brothers, who operate their business as a partnership, do not receive the deduction of corporation license fees which is given to merchants who operate in the form of corporations.

In the case of *Quaker State Cab Co.* v. *Pennsylvania*, 277 U. S. 389, the Court held unconstitutional a taxing statute which was imposed upon corporations operating taxicabs but exempted individuals so engaged. Such discrimination was denounced as *unusual*.

In striking down the tax the Court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. *The discrimination is not justified* by any difference in the source of the receipts or in the situation or character of the property employed. . . . . No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the State Court in this case, the section violates the Equal Protection Clause of the Fourteenth Amendment. (Citing authorities.) The tax cannot be sustained."

In the case of *Garysburg Mfg. Co.* v. *Pender*, 42 Fed. (2nd) 500, a three-judge Court held void a North Carolina statute for intentional discrimination between individuals and corporations in the matter of taxation upon shares of stock owned by them respectively in foreign corporations.

Thus discrimination *against* a corporation was held to violate the Equal Protection Clause. *A fortiori*, discrimination *in favor of* corporations against Levy Bros., a partnership, is not only *unusual*, but wholly unjustifiable.

Frost v. *Corporation Commission*, *278 U. S. 515.*

In this case Mr. Justice Sutherland said (p. 522):

> "A classification which is bad because it arbitrarily favors the individual as against the corporation, *certainly* cannot be good when it favors the corporation as against the individual."

A further example of the discrimination is referred to in the affidavit of Mr. Levy which appears in the Stewart record, page 81. Richman Brothers Co., a large chain store organization, maintains a store for the sale of men's ready-to-wear clothing in the City of Louisville. This store competes directly with the department in Levy Brothers handling similar items. The gross sales of the Richman Brothers stores does not exceed $400,000.00 and it would therefore be taxed in the lowest bracket. The competing department operated by Levys is taxed in a much higher bracket. Richman Brothers Co. does not own or operate any other store in Kentucky. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Brothers' business, and every advantage which Levy Brothers has in the conduct of its men's clothes department can be found to a much greater extent in the Richman Brothers Co. organization. In spite of this fact the rate of taxation on the Levy department is twenty times that imposed on Richman Brothers Co. When the deductions are considered the Levy Brothers' rate of taxation is forty times that imposed upon its competitor.

The Kentucky Gross Retail Sales Tax Bill, when introduced in the House of Representatives, bore the title which shows the intent and design of its sponsors when it recited,

as set forth in the Bill of Complaint, that it was an *"Act to Restrain the Unfair Competition of Chain Stores and in aid of individual merchants of the Commonwealth."* And it does not matter that the name or title by which it was known was afterwards changed. A person whose name is changed is the same person.

The Act as finally enacted was even more vicious than its name indicates inasmuch as the final Act discriminated, not only against chain stores, but against individual stores having large sales as well.

If there should be any uncertainty about the intent and design of this Act if we look merely at the Act itself, its meaning is made somewhat clearer when one reads the bulletins of the Kentucky Food Distributors Association, which sponsored the bill, shown on pages 93 to 95, Stewart record, wherein it is stated:

> "Our investigation has shown that very few independent retailers enjoy business in excess of $400,000.00. Our further investigation indicates that 92% enjoy a volume of less than $60,000.00, hence 92% of the Independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop Chains get by having to pay the maximum 1% under the sliding scale. We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.00."

And if there should still be any doubt that this Act was passed as a measure of discrimination against the plaintiffs, and a few similarly situated, and for the purpose of equalizing competition between the efficient and inefficient, the answer filed by the defendants in this cause should make it clear when they say, on page 63 (Kroger record):

> "Defendants further say that with the coming of the multiple owned stores, such as operated by this

plaintiff and others similarly situated, that such individual merchants are, in a large part, being driven from business."

The effect of this designed discriminatory feature is illustrated by the Kroger case. That Company operates 263 stores in the State of Kentucky. The yearly sales in each store average about $50,000.00. Each store competes with one or more neighboring stores having equal or greater sales. (See exhibits pages 134-147 Kroger record.)

The Kroger stores are required to aggregate their sales with the sales of all other stores in the State of Kentucky and as a result the highest rate of taxation is imposed on the Kroger stores. Its competitors, however, are not subject to such aggregation, and although each competes with a Kroger store subject to the highest rates of taxation, each of them pays only at the lowest rate. Practically all of them pay no tax at all because of the deductions allowed by the Act. The desire of the drafters to "wallop" one chain store organization in the State has been carried out by these two provisions.

The discriminatory feature which was referred to above in regard to the Kroger case is enhanced by the fact that many of the competitors are members of voluntary chains and as such members enjoy every benefit which units in the Kroger organization have. The Independent Grocers Alliance, commonly known as the I. G. A., has approximately ten thousand stores which is about double the number of stores operated by Kroger. (Kroger record 122.) A copy of the I. G. A. contract can be found in the Kroger record, page 129. This contract shows that the members of the voluntary association receive the same advantages in regard to quantity buying, cash discounts, skill in buying, warehousing of goods, uniform pricing and sales policies, turnover, unified advertising, standard forms of display,

superior and concentrated management and standardization as are received by members of Kroger organization.

The unified advertising is shown by the exhibits which appear on pages 187, 189, 190 and 191 of the Kroger record, referred to in the affidavit of John E. Donohue at pages 181 to 185 of the record. The exhibit on page 180 referred to in the affidavit of Gilbert Schneider appearing on page 163, is another illustration of common advertising.

On page 188 there is a picture of two competing stores, one operated by the Great Atlantic & Pacific Tea Company, a chain store organization, and the other by a member of the Independent Grocers Alliance. All members of the Independent Grocers Alliance have store fronts which are similar to the store front appearing on the left-hand side of the picture. The interiors of these stores are arranged along similar lines under the direction of supervisor sent out from central headquarters. (Record 152.)

In spite of the similarity, however, the A. & P. store which is pictured on page 188 pays a tax of 1% and its competitor has no tax to pay. (See figures in regard to Georgetown store Exhibits A and B, affidavit of John Donohue, record 185 and 186.) Exhibit B shows that any tax which would be imposed on this particular merchant would be wiped out by the deductions to which he is entitled under the Act.

As a last illustration of the discriminatory features of the Act, we wish to refer again to the audit of tax returns which appears in the Kroger record at page 100. The Kroger tax in Kentucky for 1930 is in the neighborhood of $113,000.00. The audit shows that 16,374 other merchants in the State would only have to pay a tax of $65,656.20. Kroger's tax therefore would be double that imposed by the Act on 16,374 competing merchants. The sales of these 16,374 competing merchants amount to $260,000,000.00. Kroger's sales in Kentucky are approximately $12,600,-

000.00. In other words, Kroger, with 3½% of the sales is required to pay almost double the tax paid by more than 16,000 competing merchants.

The Act complained of is of that type of legislation, prompted by ulterior motives, with which the Courts have often been required to deal and against which, but for the protection of the Fourteenth Amendment, the property of the nation would be very insecure. The inefficient business man who is unable to meet competition and prosper, often feels that the Government should be called upon to protect him from his efficient competitor, and instead of reforming his own methods so as to enable him to meet competition, seeks, through the force of Government, to destroy his efficient competitor.

Such legislation, designed to give some persons an advantage in competition over a less popular but more efficient person, violates sound economic law as well as principles of fundamental government. Strict adherence to the principle of free competition among the people of the Nation, and to the economic law of supply and demand is responsible, in great part, for our present industrial leadership among the nations of the world.

Our National and State Governments have considered free competition so vital to the welfare of our people that to foster, rather than to destroy, such competition, penal statutes, such as the Sherman Act, have been enacted for the very purpose of preventing any sort of interference with free competition, making it a very serious penal offense for the formation of any combination in restraint of trade and commerce.

In dealing with this question a notable professor of political economy stated that resolute self-reliance in overcoming economic difficulties seems to offer a safer solution than governmental favoritism to the inefficient. Tax and regulatory legislation has frequently been resorted to for the

purpose of equalizing competition between the wide awake and efficient and the indolent and inefficient, the legislatures disregarding entirely the economic loss to the State by such legislation. In one such case, *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, the late Mr. Justice Brewer said, at page 104:

> "Is it true in this country that one, who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits?" . . . . "Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services."

And in the same case the learned Justice quotes from what he calls the warning words of Judge Catron, afterwards Mr. Justice Catron of the Supreme Court, in *Vanzant* v. *Waddel*, 2 Yerger 260, 270, as follows:

> "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

Legislation of the kind involved in this Act is not new. An early type was the well-known ordinance adopted by

village councils aimed at peddlers or vendors of merchandise from house to house. To prevent these itinerant merchants from competing with and perhaps, in some instances, underselling the local storekeeper, the village council, generally composed in part, at least, of some of the village merchants, passed an ordinance assessing a license charge of $100.00 a day upon the itinerant merchant. And though the itinerant merchant, the peddler, was universally conceded to come within the provisions of the Police powers, and therefore subject to regulation and license, the Courts uniformly held that the license fee should not be any higher than what was reasonably necessary to pay the cost of regulation. So, under these decisions the exorbitant daily or weekly license fees were frowned upon by the Courts and, except in rare instances, have passed out of vogue. A few examples of legislation of this kind will be found in the following cases: *People, ex rel. Moskowitz,* v. *Jenkins,* 202 N. Y. 53, 94 N. E. 1065; *People* v. *Wilson,* 249 Ill. 295, 94 N. E. 141; *Ex parte Irish,* 122 Kan. 33, 250 Pac. 1056; *Campbell Baking Co.* v. *City of Harrisonville, Mo.* (D. C. Mo. 1927), 18 Fed. (2d) 159; *City of Duluth* v. *Rosenblum* (Minn. Sup. Ct.), 230 N. W. 830.

Another type of legislation designed to equalize competition between the efficient and the inefficient merchants, was the attempt to make it unlawful for merchants to give premiums with the sale of merchandise. This type of case will be found in *People* v. *Gillson,* decided in 1888 in the Court of Appeals of the State of New York, 109 N. Y. 399, 17 N. E. 343. In that case Judge Peckham, afterwards Justice Peckham of the Supreme Court, said:

> "It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community, against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own

against such competition and therefore flying to the Legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors."

A generation or so ago we had the anti-department store legislation. Merchants (using the language of Judge Peckham, *supra*), thinking it impossible to hold their own against the competition of the department store, attempted in two ways to drive the department store out of business. The first was, by prohibiting the department store from selling certain kinds of merchandise where certain other kinds of merchandise were sold; and secondly, by taxation which put the ordinary merchant in one class and the department store in another class, imposing no tax upon the ordinary merchant and a very onerous tax upon the department store. The first example of anti-department store legislation arose in the City of Chicago where an ordinance was passed which prohibited the sale of provisions in the same store where dry-goods, clothing or jewelry were sold. The Supreme Court of Illinois in 1899 held such legislation invalid. See *City of Chicago* v. *Netcher,* 183 Ill. 104. The second type of anti-department store legislation arose in Missouri. The legislature classified stores into two divisions, one employing fifteen or more persons and selling goods of more than one enumerated class, and the other employing less than fifteen persons. An onerous tax was assessed upon the large store, and no tax upon the small one. The Supreme Court of Missouri in *State, ex rel. Wyatt,* v. *Ashbrook,* 154 Mo. 375, 48 L. R. A. 265, declared such legislation unconstitutional, holding that the attempted classification was without reason and arbitrary and constituting, not a rightful regulation, but an undue restriction upon a business in the interest of others. This Court said:

"Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy

suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly classification run wild. It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this Act."

The Court of Appeals of New York, in the case of *People, ex rel. Moskowitz,* v. *Jenkins,* 202 N. Y. 53, 94 N. E. 1065, in declaring invalid similar legislation, said in the syllabus of the case:

> "A license tax passed to protect some class in the community against the fair, free and full competition of some other class, is not a valid exercise of the Police power."

And the Supreme Court of the United States, in the case of *Liggett Co.* v. *Baldridge,* 278 U. S. 105, at page 113, holding unconstitutional a statute aimed at chain drug stores, said:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

What are the rules that have been laid down by the Courts to guide us in determining, under the equal protection clause of the Fourteenth Amendment, just when an attempted classification in taxation is reasonable and not arbitrary?

The Courts have been quite careful to refrain from laying down any iron-clad rule which would solve all cases. *Bells Gap R. R.* v. *Penna,* 134 U. S. 232; *Citizens Telephone*

Co. v. *Fuller,* 229 U. S. 322; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Jackson* v. *State Board of Tax Commissioners,* 38 Fed. (2d) 652.

In the *Bells Gap case,* 134 U. S. 232, it is stated:

> "It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise."

In the *Louisville Gas Company* v. *Coleman case,* 277 U. S. 32, at page 37, the Court said:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases, as they arise, are to be considered."

Though the Courts have hesitated to lay down a rule which would solve every case, they have laid down certain general principles as a guide, which, if applied to the case at bar, bring us to the inescapable conclusion that the appellants, under the Kentucky Gross Retail Sales Act, have been denied the equal protection of the laws. Some of these rules are as follows:

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, at page 37.
>
> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the Courts under the Fourteenth Amendment unless they can see clearly that

there is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched." *Missouri R. Co.* v. *May*, 194 U. S. 267, at page 269.

"The equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him, or it, burdens and liabilities which are not cast upon others similarly situated. . . . . Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed." *Atchison, etc., Co.* v. *Matthews*, 174 U. S. 96, at page 104.

We grant that the power of the State to classify for purposes of taxation is of wide range and flexibility, providing, however, that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike, or, to state the proposition in a different way, a mere difference between the classes is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is imposed and can never be made arbitrarily and without any such basis. Discriminations of an unusual character are to be looked at quite carefully to determine whether or not they are obnoxious to the Fourteenth Amendment. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32.

The answer of the Attorney General attempts to justify the Act by saying that retail merchants are "classified by amount of annual gross retail sales." We examine the Act

and we find that all retail merchants are divided into eight different classes, as follows:

Class 1. Sales up to $400,000.00.
Class 2. Sales between $400,000.00 and $500,000.00.
Class 3. Sales between $500,000.00 and $600,000.00.
Class 4. Sales between $600,000.00 and $700,000.00.
Class 5. Sales between $700,000.00 and $800,000.00.
Class 6. Sales between $800,000.00 and $900,000.00.
Class 7. Sales between $900,000.00 and $1,000,000.00.
Class 8. Sales over $1,000,000.00.

Class 8, above, in which the complainants are placed, is nominally taxed, under the Act, twenty times as much as any merchant in Class 1 but is actually taxed by reason of the deductions as shown by the evidence, considerably more than twenty times as much as any merchant in Class 1, and yet all of complainants' competitors are in Class 1. The record also shows that there is only a handful of retail merchants in the whole State of Kentucky outside of Class 1, and that, by reason of the exemptions, practically everybody in Class 1, is not only tax exempt but that it was clearly the design and intent of the Legislature that they should be.

Though the complainants allege in their Bills that their business is no different in any respect from their competitors, and prove, by evidence, that there is no difference in the kind or quality of merchandise offered for sale or at the price sold between them and their competitors, and even show by evidence that the exterior of the stores of one of the complainants and its competitors are alike, the defendants do not offer a single bit of proof that there is any difference of any kind between the complainants as retail merchants and their competitors. The only difference claimed by the defendants is that the complainants have large sales and others have small sales. In the affidavits filed by the defendants of the three professors of Political

Economy, and we call the Court's attention to the fact that there is no other evidence filed by the defendants, no attempt is made on theory or in fact to show that there is any justification for the eight separate classes into which retail merchants are divided by this Act. The Professors, in their affidavits, classify retail merchants into two classes and only two. That is the large merchant and the small merchant, and there is no evidence before this Court on the part of the defendants to show that there is any reasonable difference between the class of merchants upon whom a tax of one-twentieth of one per cent is assessed, and between the class upon which a tax of two-twentieths of one per cent is assessed; or between the class upon which a tax of one-twentieth of one per cent is assessed, and upon the class upon which a tax of one per cent is assessed. The only classification shown by the defendants' evidence is, as stated above, the classification termed the small merchant, or the small scale operator, and the large merchant. The only classification attempted is that which was frowned upon and disapproved by the Supreme Court in *Cotting* v. *Kansas City Stock Yards, supra,* where the Court said, at page 103:

> "It appears that a classification is attempted between stock yards doing a large and those doing a small business."

It is submitted that if a classification of stock yards into those doing a large business and those doing a small business is unreasonable, and arbitrary, an attempt to classify retail merchants or grocers in such a manner would be equally unreasonable and equally arbitrary. Justice Holmes has stated the same principle, in *Engel* v. *O'Malley,* 219 U. S. 128, at p. 138:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and the small."

But the Attorney General says in his answer that the classification rests not only on the volume of gross retail sales, but also upon the ability of the merchant to pay the tax imposed because the per cent of income per dollar investment increases progressively in the same, or approximately the same ratio to the volume of sales as does the rate levied by the Act. In support of this attempted classification they offer the affidavit of Professor Martin, who says that large stores, chains and departments, operate more efficiently than small stores and therefore have a distinct competitive advantage and sell to the consumer at prices decidedly lower than those of the small scale competitor, and that by reason of, or as a result of, these advantages, which must certainly be free and open to everyone, the large merchant obtains a greater ratio of net gain to net sales than the small merchant. To prove this contention Professor Martin has attached to his affidavit two exhibits, Exhibit 1 and Exhibit 2. (Kroger record, p. 339.)

We examined these two exhibits of Professor Martin and we find on Exhibit 1 that the merchant doing $500,000.00 or less business, has a ratio of 2.8% of net gain to net sales, while the merchant doing from $500,000.00 to $2,000,000.00 has a ratio of 3% in net gain to net sales, and the merchant doing business from $2,000,000.00 up has a ratio of 5.2% of net gain to net sales. It is to be observed that this Exhibit relates to specialty stores, a line of business which has ordinarily a high ratio of net gain to net sales. If we should rest our case on this exhibit we do not find that the ratio of net gain to net sales is in any way proportional to the tax which would be levied under this Act upon the two classes of merchants. The merchant with less than $500,000.00 has a ratio of 2.8% of net gain to net sales, while the $2,000,000.00 and upward merchant has a ratio of 5.2% of net gain to net sales. The tax, however, on the smaller merchant is one-twentieth of one per cent, while

the tax upon the large merchant is approximately one per cent. Therefore, under Professor Martin's Exhibit No. 1, where the large merchant has less than twice the ratio of net gain to net sales as the small merchant, he pays twenty times the amount of tax assessed under this Act.

The exhibit of Professor Martin, No. 2, is more conclusive because there he deals with a ratio of net gain to net sales in department stores and he shows the department store with less than $150,000.00 in sales having a net gain to sales ratio of three per cent, and he shows the department store having sales up to $10,000,000.00 with a ratio of net gain to net sales of 3.9%. So in the instance shown on Professor Martin's Exhibit No. 2 the small merchant has approximately the same ratio of net gain to net sales, viz.: 3%, as against 3.9%, whereas the tax on the large merchant is approximately twenty times what it is on the small merchant. So the theory of the Attorney General, set up in his answers, that the tax increases on sales in the same ratio as net gain increases to net sales, is not supported by his own evidence, and it is absolutely and unqualifiedly contradicted by the evidence of the Kroger Co. which shows conclusively that it has never made a greater ratio of net gain to net sales than two to two and one-half per cent, while during the years 1929 and 1930 in the State of Kentucky it has actually suffered a loss.

But the Attorney General contends that even if the tax cannot be supported on the theory of the ratio of net gain to net sales, it can be supported on the theory of the ratio of net gain to net worth and supports this theory by Professor Martin's exhibits Nos. 3, 4 and 5. When we examine these three exhibits we find the following: Exhibit No. 3 shows that the smallest merchant makes a ratio of 2.7% of net profits to net worth, while the largest merchant shown makes a net profit of 3.2% to net worth. In other words, though the large merchant makes only about

one and one-half times as much on the ratio of net profits to net worth, the tax imposed is twenty times as much, which denies the Attorney General's contention that the tax increase in the several classes is in approximately the same ratio as the net profits are to net worth. In Exhibit No. 4 there are virtually two classes considered. This exhibit deals with specialty stores in which apparently, according to the learned Professor, there is a high ratio of net gain to net worth, the small merchant having a ratio of 6.5% and the largest merchant shown having a ratio of 14%. Here again we find, though the large merchant only makes a little more than twice as much on the ratio of net gain to net worth he pays twenty times as much in tax. Professor Martin, Exhibit No. 5, deals with department stores, showing that the smallest department store has a gain of 6.3% of its net worth, while the $10,000,000.00 department store has a gain of 8.1% of net worth. Here again there is no relation between the ratio of net gain to net worth in any way comparable to the increase in the tax. The Attorney General then further seeks to justify the tax on the theory that the large merchant pays a lower ratio of ad valorem taxes to sales than the smaller merchant, and supports this theory with Professor Martin's Exhibits Nos. 9, 10 and 11. We have examined these exhibits very carefully and cannot find where there is any marked difference in the ratio of taxes to sales between the large merchant and the small one, certainly no such difference in ratio approximating the difference in the tax which is sought to be justified.

The observations and figures set forth by the three learned professors are theoretical and are absolutely contradicted by the exact figures given by the appellants.

No sworn evidence of actual taxes paid by individual or small merchants as compared with this plaintiff's, has been submitted in evidence. However, in the verified Bill of

Complaint of the Stewart Dry Goods Company we find that Company with but $3,000,000.00 in sales has paid taxes of $80,000.00, approximately two and one-half (2½%) per cent of its volume of sales. Professor Martin, however, does not claim that the figures given by him in his exhibits showing the ratio of taxes paid to sales, are reliable. He says: "The table indicates clearly that, if information available is typical, the large merchant generally must pay less taxes, relatively speaking, than the small," and on page 335 (Kroger record) he says that "On the basis then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax paying ability than the small one, but in actual practice at the present time he *appears* to pay less tax in proportion to amount of business than does his already *handicapped* competitor."

An analysis of Professor Martin's testimony and his exhibits, shows that his tables are not only unreliable, but that, even if taken to be true, they do not, in any way, tend to substantiate the answer of the Attorney General, that the ratio of net gain to net sales, or the ratio of net gain to net worth, or the ratio of ad valorem tax to sales or to capital invested, between the large merchant and the small one, is in any way comparable to the ascending scale of rates applied in the Sales Tax Act. No attempt is made in the answer, or the evidence, of the defendants to show that there is any reasonable and just difference among the retail merchants of Kentucky supporting the attempted classification of such merchants into eight separate taxing groups, imposing an accelerating tax rate on each succeeding group in an arbitrary, disproportional, unreasonable and confiscatory manner.

The appellants in their affidavits, particularly in the affidavit of Mr. Lyons, a merchandising expert, and Mr. Bonham, a man of many years of practical experience in the grocery business, show that there is absolutely no relation

between net profits and gross sales. Ordinary common sense supports these statements, otherwise large sales would always mean large profits, when we know as a matter of fact that large business concerns meet with failure in just about the same proportion that small ones do, and Mr. Bonham's affidavit particularly states, from his years of experience, that he knows of nothing in the grocery business which would tend to make $400,000.00 a dividing line upon which to base anything, and that the tax based upon each $100,000.00 of sales above $400,000.00 is not based on any means or methods of classification or accounting known to the grocery business.

Not only is there no reason, except arbitrary selection, to start the rate of tax increase at $400,000.00 of sales and no reason to base the rate multiplication on each $100,000.00 of sales thereafter until the aggregate of all sales is $1,000,000.00, but, if ascending taxes are justified by ascending sales, there is not the remotest reason for stopping the rate of increase at $1,000,000.00.

The answers attempt to justify the classification set up in the Act upon the volume of sales and the rate imposed upon the merchants in the several classes as being in proportion to:

(1) The ability of each class to pay;
(2) The ratio of net gain to net sales;
(3) The ratio of net gain to net worth;
(4) The ratio of ad valorem taxes to sales.

Of course, one having greater property has the ability to pay more taxes than one having less property, but the ability to pay taxes of the one having more property is only proportionately greater. That is, one who has Ten Thousand Dollars of property has the ability to pay ten times as much taxes as one having One Thousand Dollars of property. The rates, however, fixed in this Act are not

in proportion to the ability of the several alleged classes to pay taxes, even if we do take as a matter of fact the theories of Professor Martin. If a merchant who has sales of One Million Dollars were required under this Act to pay ten times as much as one who had sales of One Hundred Thousand, the Act would be levying the tax in proportion to the ability to pay according to Prof. Martin's theory, but not in accordance with our facts, because "gross sales" have no necessary relation to earnings or invested capital. In the cases at bar, the tax levied is out of all proportion to the ability to pay. It is out of proportion to the ratio of net gain to net sales, even according to Professor Martin's tables. It is out of proportion to the ratio of net gain to net worth, according to the facts in the record. It is out of proportion to the ratio of ad valorem taxes to sales because, so far as the record shows, there are no facts before the Court to support the claim of the Attorney General that the large merchant should pay a larger ratio of ad valorem taxes to sales than the small merchant. And, anyhow, ad valorem taxes are assessed upon the value of taxable personal and real property and not upon sales.

It is apparent that the theory of classification and rates set up by the Attorney General is not sound, but is, in the words of Mr. Justice Pitney, illusory. The attempted classification and rates do not rest upon any ground of difference between the complainants and the several thousand merchants in the State of Kentucky with whom the complainants are competing, but the challenged Act is an attempt to impose an unjustifiable tax burden upon the complainants, exempting, at the same time, others in the same circumstances and in the same calling and business.

The equal protection clause of the Fourteenth Amendment has been invoked on matters of regulation and on questions of taxation. If a particular trade or business is subject to regulation under the police power it might be

more susceptible of refined classification than it would be in matters of taxation. But the ordinary business of retail merchandising has never been made the subject of general regulatory police measures, though some features of the merchandising business, such as the sale of oleomargarine, as referred to by the Attorney General, may be the subject of regulation. No attempt has ever been made, so far as we can find, wherein the entire retail business structure of the country has been brought within the regulatory power of the Legislature.

In *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, the late Chief Justice Taft said, at page 537:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher or the baker, the tailor, the wood-chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."

And Justice Hughes, now Chief Justice Hughes, said in *Truax* v. *Raich*, 239 U. S. 33, at page 40:

> "The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

and further, at page 41:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

A tax on large volume sales is after all an attempt to discriminate against business merely because of its size. This size may result because the quality, price or service characteristic of the business has attracted public patron-

age and large sales; or its size may result from its policy of selling a large volume of merchandise at low prices, and therefore requires large sales in order to make any profit. Whatever the reason, mere size does not justify discrimination. *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, the Court said:

> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In *Adams* v. *Tanner*, 244 U. S. 590, at page 594, the Court said that because abuses may and probably do grow up in connection with business, it is not enough "to justify destruction of one's right to follow a distinctly useful calling in an upright way." The Court said that there is no profession or business which does not offer an opportunity for reprehensible practice, and someone can always be found ready to maintain that its suppression would be in the public interest, but the Court said:

> "Skillfully directed agitation might also bring about apparent condemnation for any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

The above language is quoted approvingly in *Fairmount Creamery Co.* v. *Minn.*, 274 U. S. 1, in which the Court held unconstitutional a statute providing that any person in the business of buying milk who discriminated between localities in the state by purchasing at a higher rate in one locality than in another, should be deemed guilty of unfair

competition. In the course of the opinion, Justice McReynolds said at page 9:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil."

The late Justice Day in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, said:

> "Arbitrary selection, it has been said, cannot be justified by calling it classification."

And the Court of Appeals of Kentucky in the case of *City of Danville* v. *Quaker Maid, Inc.*, 211 Ky. 677, where a different tax was imposed upon regular service grocery stores than upon self-service cash and carry grocery stores, said:

> "The only difference between the business of appellee and that of the ordinary grocer is that appellee extends credit to no one and makes no deliveries. But this difference in this detail of conducting the business affords no reasonable ground for classifying appellee on a basis of taxation purposes different from that of the ordinary grocery store."

In *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, at page 112, the Court said:

> "If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the

> guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above named."

In the case from which we have just above quoted an act, general in terms, but so framed as to apply only to the Kansas City Stock Yards, was held unconstitutional.

In this case the Court also said:

> "This statute is not simply legislation which, in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

It is plainly apparent that the Kentucky Retail Sales Act, just as in the Kansas City Stock Yards case, was aimed at a few large merchants taxing them at a high and confiscatory rate and exempting their competitors. No other conclusion can be reached when we realize, as shown by the uncontradicted record in this case, that Kroger alone is required to pay more than twice as much taxes on its sales of $12,000,000.00 than 16,374 retail merchants pay upon sales aggregating over $260,000,000.00, and when the record indisputably shows that 99.8% of all the retail merchants in the State of Kentucky, doing approximately 85% of the total retail sales pay only one-half as much taxes as one of the appellants is required to pay. To paraphrase the language of Justice Brewer in the Kansas City Stock Yards case, if such legislation does not deny the equal protection of the laws we are unable to perceive what legislation would.

Cases Relied on by Defendants.

The defendants rely chiefly on the following cases:

Clark v. *Titusville*, 184 U. S. 329;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283;
Metropolis Theater Co. v. *Chicago*, 228 U. S. 61;
Quong Wing v. *Kirkendall*, 223 U. S. 59;
Pacific Fisheries v. *Alaska*, 269 U. S. 269;
State Board of Tax Commissioners v. *Jackson*, 283 U. S. 527;
Forrest Moore v. *State Board of Charities*, 238 Ky. 243, 239 Ky. 729.

Clark v. Titusville, 184 U. S. 329.

The above case involved the constitutionality of a City Ordinance of Titusville imposing a license tax upon merchants in that city. It was an occupational tax in different amounts, measured by sales. The tax was graded downward from Five Dollars for a merchant who did a business of One Thousand Dollars, to One Hundred Dollars for a merchant who did a business over Sixty Thousand Dollars. There was an obvious attempt to grade the tax proportionately to sales so that every one would pay relatively a similar percentage. The graduation was not worked out with mathematical certainty but the net result was that the merchant with large sales paid a somewhat smaller sum in proportion to sales than a merchant with smaller sales. This inequality was incidental and there was no designed or intended discrimination such as exists in the cases at bar.

The Supreme Court held that the Ordinance did not conflict with the Fourteenth Amendment to the Federal Constitution because it was a license law, or to quote the language of the Court at page 334 "The tax in the case at bar is a tax on the privilege of doing business."

It should be noted that the City Ordinance involved in the Titusville case only imposed a small license fee which approximated the cost of inspection. While it costs more to inspect a large concern than it does to inspect a small concern, the percentage of the cost to the size of the business decreases as the business increases. The downward graduation of the tax constituted a recognition of this fact. Concerns with large sales were charged a greater amount in dollars than concerns with small sales, but large concerns were charged a lesser sum in *proportion* to sales than the small concerns. The proportionate difference between the amount charged concerns with large sales and concerns with small sales was slight—but a few hundredths of a per cent.

The fact that taxes assessed in the lower brackets under the Titusville ordinance are slightly higher in proportion than in the higher brackets may be accounted for in part by the rule of convenience and in part by the circumstance that proportionately the expense of collecting the tax in the lower brackets is much higher than in the higher brackets.

With these trifling differences in rate of taxation levied upon the various classes, the Supreme Court must have been mindful of the principle long before announced by it in the State Railroad Tax Cases, 92 U. S. 575 (612) which reads as follows:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations or the different classes of property subject to taxation, is a dream unrealized."

The courts have always refused to demand absolute mathematical nicety in adjusting the burdens of taxation and brushed aside the objections made to the tax in the Titusville case by saying (p. 331), that they were merely objections to classification by amount, and we have seen from the various opinions already cited that classification

by amount, *when the rule of arithmetical proportion is observed,* tends to avoid discrimination instead of creating it.

If we examine the Titusville ordinance as a whole, we will find that, taking the *average* of each class, instead of the extremes in each class, there is little if any departure from the principle of uniform gradation of the tax according to amount of business. In the lower brackets the license tax is a little bit higher in proportion than in the upper brackets, but, of course, as much expense for bookkeeping and collection is involved in a tax bill of $5.00 as in a tax bill of $100.00, and there is such a thing as reducing the rate of taxation to a point where it would net no revenue at all.

The authorities all indicate that the courts will not interfere merely to correct mathematical inaccuracies in fixing the basis of a tax or to correct accidental inequalities of taxation in particular cases.

There is a vast difference between a small tax of from Five Dollars to One Hundred Dollars, proportioned in accordance with the cost of inspection in an effort to assess the license fee equally, and a tax which practically exempts 99.8% of all retail merchants and assesses $113,000.00 on one merchant and $150,000.00 on another merchant.

There is a vast difference between a case where the Legislative Body, in its efforts to be fair and equal, graded a small license fee downward with some incidental inequalities, and the case at bar where the Legislative Body made a conscious effort to discriminate against lawful business.

The Titusville case is a typical case of a small license fee to pay the cost of inspection and regulation borne by all in equal proportions. The Gross Sales Tax Law was not designed as a license measure but as a tax weapon to "aid" some merchants at the expense of others.

Finally, there is a vast difference between proportionate graduation downward and disproportionate multiplication upward.

We do not question the right of the Legislature to enact a small occupational tax to meet the cost of regulating and inspecting retail business, and fairly proportioned in accordance with sales. We question the right of the Legislature to place an excessive and discriminatory tax on a few retail merchants in order to aid their competitors in the same general class who are practically exempt from taxation. The Titusville case cannot be expanded to cover the latter case and the decision is confined to the particular ordinance involved.

Magoun v. Illinois Trust, 170 U. S. 283.

The above case sustained a graduated inheritance tax law. Inheritance taxes stand apart from other taxes. The Court itself says, at page 288:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Again, at page 290, the Court says:

> "And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The Illinois inheritance law under consideration graded the tax on inheritances by the amount of the inheritance.

In justification of this provision Justice McKenna said, at p. 300:

> "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance."

There is no natural right to inherit. It is a privilege conferred by the State. The State may take all or such percentage of the inheritance by escheat or taxation as it chooses. Furthermore, a graded inheritance or estate tax has the further justification that it is based upon the ability of the taxpayer to pay the tax. The ability of a man who inherits more property or who has a large income, to pay higher rate of tax than a man with less property or less income, is the principal justification for graded income taxes. The Kentucky sales tax entirely disregards the ability of the taxpayer to pay the tax. As previously pointed out, a taxpayer with large sales may sustain a loss, while a taxpayer with much smaller sales may make a profit, nor are sales a measure of the amount of property owned by the taxpayer. The volume of sales may depend upon the character of the business and the number of times the capital invested in such business is turned.

While there is no natural right to inherit property, the taxpayers, in the cases at bar, have a natural, lawful and constitutional right to engage in their respective businesses in the State of Kentucky. They may not be deprived of that right by the State and the State is not free to condition that right as it chooses.

It can hardly be urged that inheritance taxes graded in accordance with ability to pay, and taxing the privilege of inheritance or succession, are a precedent for arbitrary and discriminatory revenue laws.

Metropolis Theater Co. v. Chicago, 228 U. S. 61.

The above case sustained a city ordinance of Chicago imposing a license fee on places of public amusement graded according to the price of admission, from $200.00 for theaters charging not to exceed twenty cents, to $1,000.00 for theaters charging one dollar or more. The legislation in question was strictly a license law enacted by the city pursuant to its police power. Theaters and public amusements have long been recognized as proper subjects for regulatory license laws and come clearly within the police power of the State to regulate places of amusement in the interests of the public health, safety, morals and welfare. Complaint was made that the classification was arbitrary. The Court said, at p. 69:

> "It will immediately occur upon the most casual reflection, that the distinction the theater *itself makes* is not artificial and must have some relation to the success and ultimate profit of its business. In other words, there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action."

The Chicago ordinance simply followed a classification which the theater business had itself adopted. Any theater, or place of amusement, was free under the ordinance, to fix its own price of admission and by so doing to determine its own classification for licensing purposes. As the Court well said, a classification which merely follows the classification adopted by the industry itself, and which leaves the taxpayer free to choose for himself which class he prefers to come under, cannot be considered arbitrary or unreasonable.

The classification adopted by the sales tax does not follow any known classification in any industry in Kentucky and the taxpayer has no choice, except to stop selling merchandise after his sales reach one or more of the arbitrary points at which the tax rate jumps or multiplies.

Quong Wing v. Kirkendall, 223 U. S. 59.

In the above case the Court sustained a Montana law imposing a license fee on hand laundries which did not apply to steam laundries. The Court said that the State could classify hand laundries separately from steam laundries. There was no discrimination between members of the same class. The Court went so far as to say that on the record it might be said that the State intended to adjust its revenue laws so as to favor hand laundries and to discourage steam laundries, just as the State may tax retail dealers and exempt wholesale dealers, or vice versa. However, the Court was careful to say two things: First, that the State may not make unreasonable or arbitrary discriminations even in carrying out a state policy and consequently, that if it were shown that the statute was actually aimed at laundries operated by Chinese the decision might be different. We quote this significant language from the syllabus:

> "On the record as presented in this case, and without prejudice to determining the question, if raised in a different way, the statute of Montana imposing a license fee on hand laundries does not appear to be unconstitutional. . . . Quaere: Whether this statute is aimed directly at the Chinese, in which case it might be a discrimination denying equal protection.
>
> When counsel do not bring the facts before it, the Court is not bound to make inquiries.
>
> Courts sometimes enforce laws which would be declared invalid if attacked in a different manner."

In the case at bar we have shown by factual evidence of record that the gross sales tax is aimed directly at chain stores and department stores and is a discrimination between retail merchants engaged in the same general class of business. If the facts are properly presented the Court will go behind the face of the law to ascertain its practical operation and effect. This was held in *Bethlehem* v. *Flynt*, 256 U. S. 421. In that case a North Carolina statute taxing automobile manufacturers $500.00 unless three-fourths of the entire assets of such manufacturer were invested in bonds of North Carolina or property situated therein, in which case the tax was reduced to $100.00, was held to work a discrimination between automobile manufacturers, contrary to the Fourteenth Amendment, and also to violate the commerce clause of the Federal constitution. The Court went behind the face of the law and based its decision upon its practical operation and effect.

In *Shaffer* v. *Carter*, 252 U. S. 37, the Court declared:

> "The constitutionality of such tax depends upon its practical operation and effect, not on mere definition or theoretical distinctions respecting its nature and quality."

We are at a loss to understand how a statute aimed at Chinese laundries, which the Court intimates would have been unconstitutional if the facts had been shown, aids the Attorney General in defending a tax law which the facts of record show is aimed at certain large retail merchants.

Pacific Fisheries v. Alaska, 269 U. S. 269.

This case involved an act of the Legislature of Alaska. Since Alaska is a territory, no question of equal protection under the Fourteenth Amendment could possibly arise in that case. The entire case was discussed by the Court on

the question of whether the Act amounted to a denial of due process. The Court held that it did not. The case has no bearing on the instant situation which involves the equal protection clause of the Fourteenth Amendment to the Constitution.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527.

This case is known as "The Indiana Chain Store Tax Case."

It decides one point—*and one point only*—that chain stores may be classified for taxation separately from department stores and other stores singly owned or operated in the same place and under the same roof.

There are many obvious differences between the Indiana law which was the subject matter of the Jackson case and the Gross Sales Tax Law which is the basis of this action. Here are some of the obvious differences:

First: The challenged Kentucky Act classifies merchants for taxation in Section 2 by volume of gross sales, some of whom are exempted by certain credits allowed by Section 4 from the burdens of the Act. Its *intended* and *actual* effect is to subsidize the unprogressive merchant having small sales, and to place upon the progressive merchant having large sales the whole burden of the tax anticipated from the law, thus taxing the latter for the benefit of the former.

The Indiana law is different. Under it, all owners of single stores are taxed alike, and all owners of multiple stores in the same brackets are taxed alike.

Second: The Indiana law classifies retail merchants according to the number of stores owned by them.

Wholly disregarding that principle, the challenged Kentucky Act taxes retail merchants according to the amount of gross sales made by them. Hence the conventional term "Gross Sales Tax Law," indicating a tax on sales, which

is equivalent to a tax on *property* sold, regardless of *earnings* or *profits* or *even collections* from such sales so taxed under the Kentucky Act.

Third: The rates of taxation under the Indiana law, with its classification of single-owned stores and multiple-owned stores, effect no such excessive or unreasonable discriminations as result under the Kentucky law.

Neither was it claimed under the Indiana law that the tax thereby imposed upon any or all of the chain stores was *per se* unreasonable or excessive. Indeed, it appears from the dissenting opinion in the Indiana case that the maximum tax imposed upon each store in any chain by the Indiana law was in itself moderate and not excessive.

The only point made on that score was that a decision upholding the law might possibly open the door to the enactment of future legislation levying excessive or oppressive taxes.

We quote as follows from the dissenting opinion:

> "It may be that here the maximum tax of twenty-five dollars for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the State to increase the amount to an oppressive extent."

Certainly the taxes imposed by the Indiana law do not effect any such discrimination or impose any such burdens as to shock the conscience like the taxes proposed to be levied upon the plaintiffs under the challenged Kentucky Act.

Fourth: An analysis of both the majority and minority opinion in the Jackson case shows that the Court was solely concerned with a chain store measure. The Court goes so far as to point out the difference between department stores (such as the Stewart Dry Goods Co. and Levy Bros.)

and separate stores conducted as a chain under common ownership and management.

On this point it says at page 536:

> ". . . . it is, nevertheless, evident that whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, *must after all consist of many separate types*, each devoted to a single store similar to an independent retail store. The mass buying done *by a chain store owner* for a number of units selling the *same goods* is not comparable to the *individuated* purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, *essentially separate*, and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a *chain store* owner operating an equal number of units all devoted to a *single line* of business."

This language used in the majority opinion might well have been taken from the affidavits of Mr. McKim and Col. Levy in their cases respectively, showing that in the matter of buying power, their respective department stores come into active competition with individualized specialty stores buying and selling a much larger volume of shoes or books or various other articles handled by a department store.

Thus the majority opinion is in fact as well as in effect an authority in support of the contentions made in this case by the Stewart Dry Goods Co. and Levy Bros. and other department stores similarly situated.

The minority opinion as well as the majority opinion shows that the Court was not concerned with a taxing measure which places substantially its burden upon thirty or forty taxpayers and practically exempting tens of thousands of other taxpayers engaged in exactly the same line of business, in exactly the same way but which have greater sales than the merchants who are subjected to the tax.

Neither the feature of the multiplying rate of taxation as provided in Section 2 of the Kentucky Act, nor the elements of exemptions as provided by Section 4 of the Kentucky Act, was presented to the Court in the Indiana Chain Store case.

(c) Appellants are entitled to an interlocutory injunction because the Act violates the commerce clause of the Federal Constitution in that it imposes a tax upon sales of foreign-grown farm products raised in Kentucky, and in that it has directly taxed the sale of products moving in interstate commerce.

The Act imposes a tax on sales of foreign grown farm products and exempts like products raised in Kentucky.

Section One of the Kentucky Gross Sales Tax law begins as follows:

> "The words 'retail merchant' as used in this Act shall mean and include every person, firm, association, co-partnership or corporation, owning, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, *except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State.*"

The Gross Sales Tax law applies to everyone who maintains a store for the sale of goods, wares and merchandise in the State of Kentucky, except storekeepers who sell

farm products raised by them in Kentucky. The clear intention of the Legislature was to exempt merchants who operated stores and sold in their stores farm products which are raised by them in Kentucky. This is clearly shown by the use of the word "*those*." This pronoun refers back to a preceding noun. The only noun to which it could possibly have reference is the word "merchant." Any other construction of this clause would render it meaningless, and the Court will not construe a Statute so as to render a portion of it meaningless. This is true even if such a construction would save the constitutionality of the statute, since such an action would amount to judicial legislation rather than construction. *Illinois Central R. R.* v. *McKendree*, 203 U. S. 514, at page 521.

The plain wording of the Statute shows an attempt on the part of the legislature of Kentucky to exempt storekeepers who sell farm products raised by them in the State of Kentucky, whereas, the same Act taxes storekeepers who sell farm products raised by them in other States. This amounts to a discrimination against the products of other States which is a burden on interstate commerce and is unconstitutional. Legislatures have frequently enacted similar laws but the Courts have held that to allow them to remain effective would permit the individual States of the Federal Union to erect barriers against the importation of products of other States. The present statute, if constitutional, would in effect permit the State of Kentucky to erect a tariff barrier against the importation of garden and farm products from other States.

In *Welton* v. *Missouri*, 91 U. S. 275, the Court held unconstitutional a statute of that State which required the payment of a license tax from persons who dealt in the sale of goods, wares and merchandise which were not the growth, produce or manufacture of the State of Missouri. No license tax was required from persons selling goods in

a similar way which were the growth, produce or manufacture of the State of Missouri. The Court pointed out in its opinion that if the goods of the outside States could be subjected to special restrictions by the legislature of Missouri, the object of investing control over interstate commerce in Congress by the Constitution of the United States would be entirely defeated.

A similar situation arose in the case of *Guy* v. *Baltimore*, 100 U. S. 434. The syllabus of that case reads as follows:

> "A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden or tax than upon like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them."

In 1875 the State of Michigan passed a statute which imposed a tax upon persons who, not residing in or having their principal place of business within that State, engaged there in the business of selling intoxicating liquors, to be shipped into the State from points outside of the State. A similar tax was not imposed upon persons selling similar products manufactured in the State. The statute was declared unconstitutional in the case of *Welling* v. *Michigan*, 116 U. S. 446. At page 454, the Court said:

> "If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri*, 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth,

product, or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott*, 8 Wall. 148; *Ward* v. *Maryland*, 12 Wall. 418; *Guy* v. *Baltimore*, 100 U. S. 434, 438; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Webber* v. *Virginia*, 103 U. S. 344.

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States. . . . . We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Welton* v. *Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631."

The Court in its opinion refers to the case of *State* v. *North & Scott*, 27 Mo. 464, with approval. In that case the Supreme Court of Missouri held unconstitutional a taxing statute in which the language of exception was similar to the language involved in the instant case. The tax in that case was upon merchants for all goods purchased by them, except such as were grown, produced or manufactured in the State of Missouri.

Again, in *Webber* v. *Virginia*, 103 U. S. 344, the same problem was dealt with by the Supreme Court of the United States, and the Court again held that a state statute which discriminated against products of other states was unconstitutional. After referring to the statutes involved, the Court, at page 350, declared:

"By these sections, read together, we have this result: the agent for the sale of articles manufactured

in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. *It matters not whether the tax is laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states.*"

The fact that the instant case deals with garden or farm products rather than manufactured articles does not effect the rule, and in a recent case, *Ex parte Smith*, 128 So. 864, the Supreme Court of Florida dealt with an ordinance which discriminated against dairy, poultry and farm products of other States, in favor of similar products of the State of Florida. The Court held that the ordinance was unconstitutional. The syllabus in that case reads as follows:

"A town ordinance requiring 'each and every person, firm or corporation,' selling or delivering mer-

chandise by truck, and who does not conduct and pay a license upon an established business in the town, to pay a designated license tax, but exempting from the operation of the ordinance, dairy poultry or farm products, raised, grown, or manufactured 'within the State of Florida,' but not elsewhere, held, invalid as a denial of equal protection and an abridgement of the privileges or immunities of citizens of other states, contrary to the Fourteenth Amendment of the Federal Constitution, as well as to Section 2, Art. 4 thereof."

In that case the ordinance applied to every person selling goods by means of a truck or other vehicle. It did not apply to farmers who did not sell by truck. The provision in regard to farm products raised outside of the State of Florida, was given the meaning intended by the legislative body and rendered the whole ordinance unconstitutional. In the same way, the exception in the Kentucky Act must be given the meaning intended for it by the legislature, and its presence in the statute renders the law unconstitutional as an interference with interstate commerce. A difference in the place of production or origin affords no ground for discrimination in revenue measures. An act or ordinance which attempts to make such differences is void.

In the instant case The Kroger Grocery and Baking Company operates a farm in the State of Ohio. This farm consists of three hundred and seventy acres and is named "Country Club Farm," after the "Country Club" brand, which is one of the best known of the Kroger brands. The plaintiff in the instant case raises and produces on this farm cattle, sheep, hogs, poultry, milk and other garden and farm products which are sold at retail in the Kentucky stores. See affidavit of John B. Bonham, Kroger record 126; affidavit of Albert C. Huneke, Kroger record 221; affidavit of Francis Baliard, Kroger record 224; affi-

davit of Rufus Blume, Kroger record 225; affidavit of O. W. Vaughn, Kroger record 226.

On page 227 of the Kroger record appears the affidavit of John C. Schwartz, who is connected with the Gray-Von Allmen Sanitary Milk Co. which sells milk in the City of Louisville, and who states that that corporation operates a dairy farm at La Grange, Kentucky. This milk is sold by the corporation with which he is connected, in a retail establishment in Louisville, Kentucky. By virtue of the fact that the corporation, with which Mr. Schwartz is connected, maintains this farm in the State of Kentucky, it is exempted from the operation of the Gross Sales Tax Law. Kroger, on the other hand, although it produces similar products, is subject to the tax for the mere reason that its farm happens to be in the State of Ohio rather than in the State of Kentucky.

Such a tax has been condemned by the courts in the decisions cited above, and in numerous other cases. See *Minnesota* v. *Barber*, 136 U. S. 313; *Boyce* v. *French*, 293 Fed. 43; *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421; *New York State* v. *Roberts*, 171 U. S. 658; *Ward* v. *Maryland*, 12 Wall. 418; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Brimmer* v. *Rebman*, 138 U. S. 78.

The farm products sold by the Kroger Company and by Kentucky storekeepers falling within the excepted class may only be a small part of the total merchandise sold by these companies, but the exception applies to those who "*actually*" engage in gardening or farming, and was obviously intended to secure the votes of the rural members of the legislature who were thereby assured that farmer-storekeepers would not be subject to taxation. The law does not limit the exception to those "solely" or "extensively" or even "substantially" engaged in gardening or farming, but excludes from the definition of retail merchant, hundreds of small storekeepers throughout Ken-

tucky who operate farms and sell some of their products in their stores. This exception is an integral part of the legislation under consideration. It is part of the definition of the class subject to taxation. The gross sales tax law would not and could not have been passed unless the farmer-storekeeper group were excepted from the act. Under these circumstances the exception cannot be separated from the balance of the act, and the entire act must necessarily fall. This is directly held in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. In that case the Illinois anti-trust act contained the following:

> "Section (9) The provisions of this act shall not apply to *agricultural products or livestock while in the hands of the producer or raiser.*"

The Court distinguished *Magoun* v. *Illinois* and *American Sugar Refining Co.* v. *Louisiana*, and held that the above agricultural exception from a law applicable to a general class was "not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates (page 563)." The Court then took up the question whether the above section of the law could be eliminated and leave the rest of the act in operation. The Court says, at page 565:

> "The first section of the act here in question embraces, by its terms, all persons . . . . while the ninth section declares that the statute shall not apply to agriculturalists or livestock dealers in respect to their products or stock in hand. *If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock dealers.* Those classes would in that way, be reached and fined, when, evidently, the legislature intended they should not be regarded as offending against the law . . . . Looking, then, at all the sections together, we must hold that the legislature would not have entered upon

> or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its operation . . . . *The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.*"

If the exception in favor of farmer-storekeepers is stricken from the Sales Tax then the Act will apply to such group. This was contrary to the intention of the Legislature and the entire act must fall with the exception. The Court cannot tax a large class or group of storekeepers whom the legislature did not intend to tax and specifically excepted from taxation.

The Act directly taxes the sale of products moving in interstate commerce.

Apart from the fact that the Kentucky Gross Sales Tax Law discriminates against products raised in States outside of Kentucky, the tax violates the interstate commerce provision because it is a direct tax on sales of articles moving in such commerce.

In the case of *Cook* v. *Pennsylvania*, 97 U. S. 566, the Supreme Court held that a tax on the sale of goods was equivalent to a tax on the goods themselves. In the instant case, the Gross Sales Tax Law must be considered as a direct tax on the goods sold by the merchants who are obliged to pay the tax.

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, the Supreme Court, in upholding a tax levied on net income from sales to customers outside the state, said that it would be unconstitutional if applied to *gross* income. The Court said, at pages 328-329:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, rec-

> ognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that it is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profits has not the same deterrent effect since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property . . . ."

The Kroger Company makes purchases in many States of the United States in order to supply its trade in the State of Kentucky. This merchandise includes a variety of food products. Many of these purchased articles are sold in the original packages and containers in which they are packed for shipment. Many of the items sold by the appellant in the Kentucky stores are sold to non-residents, living across the state lines, and this is especially true in those cases where the stores are near the borders of other states. (See affidavit of John B. Bonham, Kroger Record, page 125.)

Meat is delivered to the Kroger stores from packing plants outside of the State of Kentucky. It is unwrapped at the time of shipment and it is sold at the stores in exactly the same condition in which it is shipped. (See affidavit of Albert C. Huneke, Kroger Record, page 221.) The same is true of milk which is shipped and sold in the same bottles. See affidavit of Rufus Blume, Kroger Record, page 225.)

In the affidavit of Robert J. McKim, Stewart Record, page 80:

> "Stewart's trade is not confined to the city of Louisville but attracts customers from all nearby cities in this and other states . . . . . A substantial volume of Stewart's sales are made in interstate commerce to customers in other states buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other states.
>
> *Stewarts has over 2,000 regular accounts with persons residing in the state of Indiana alone,* and numerous charge accounts with persons residing in states other than Kentucky and Indiana.
>
> Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, *Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.*"

In *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421, at page 426, the Court said, relative to a tax on an agent of automobile manufacturers for the sale of automobiles in North Carolina:

> ". . . . their second contention is that the act is an attempt to regulate interstate commerce. If it have that effect it is illegal, for a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and, if the product be that of another state, it is a tax on commerce between the states. *Welton* v. *Mo.*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344; *Darnell & Son* v. *Memphis*, 208 U. S. 113."

The court said this was denied on the ground that the automobiles had passed out of interstate commerce and

had come to rest within the state. In overruling this claim Justice McKenna said, at the bottom of page 426:

> "The basis of the denial and its support by the Supreme Court, is that the automobiles had passed out of interstate commerce and had reached repose in the state and blend with other things of the state, and become subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the court that the automobiles were in the hands of the agents of the consigning corporations, and therefore, a tax against them was practically a tax on their importation into the state. It is not necessary to say *it would be useless to send them to the state if their sale could be prevented by a prohibitive tax or one so discriminating that it would prevent competition with the products of the state* . . . . . The imposition of such a tax is practically the usurpation of the power of Congress over interstate commerce and therefore illegal."

The decision of the Supreme Court in *Crew Levick Co. v. Commonwealth of Pa.*, 245 U. S. 292, is directly in point. That case involved a flat sales tax of one mill "on each dollar of the whole volume, gross of business transacted annually." Each dealer or vendor of goods and any board of trade was assessed a tax of 25c on each $1,000 worth, gross, of goods so sold. The court declared that such a tax applicable to goods sold in interstate commerce was unconstitutional and said, at page 297:

> "*It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions.* That it applies to internal as well as to foreign commerce, cannot save it; for, as was said in the case of *State Freight Tax*, 15 Wall. 232, 277, 'The state may tax its internal commerce but if an act to

tax interstate or foreign commerce is unconstitutional, *it is not cured by including in its provisions subjects within the domain of the state.*' "

We submit, therefore, that the Kentucky Gross Sales Tax law is unconstitutional for the reason that it violates the provisions of Article One, Section Eight, of the Constitution of the United States, and is an attempt to burden and interfere with interstate commerce because it taxes articles in interstate commerce directly, and because it discriminates against products grown in States outside of the State of Kentucky, in favor of similar products grown in the State of Kentucky.

(d) Appellants are entitled to an interlocutory injunction because the Act is confiscatory and constitutes an attempt to take the property of the appellants without due process of law.

The Kroger record shows that that company commenced business in Kentucky more than thirty years ago and has continued to invest capital there ever since. In 1897 it had one store—in 1899, three stores—in 1905, eight stores. In the intervening twenty-five years additional stores have been established frequently "in response to request on the part of citizens requesting the establishment of such store in their community." At the present time, Kroger has two hundred and sixty-three separate stores in various localities. Kroger has only one store in each of some fifty-five different towns. In the course of building its business, Kroger has made large investments in Kentucky in store fixtures, store equipment and in improvements to leaseholds. It owns a large warehouse in Louisville. It owns transportation equipment, merchandise of various kinds, etc. During the past thirty years Kroger has also invested large sums in intangible items, such as advertising in posters, placards, newspapers and other publications in

order to develop customer good will and patronage. Its investment in Kentucky in tangible items alone, exclusive of intangible items, exceeds a million and a half dollars. This does not include capital employed outside of Kentucky for the administration and conduct of its business in Kentucky.

This investment in the development of its business in Kentucky has been made on the faith of the right granted to the Kroger Company when that corporation was lawfully admitted to do business in Kentucky and qualified by complying with all the laws of Kentucky relating to foreign corporations doing business therein. On the faith of the right granted it to do business in Kentucky, the Kroger Company has entered into commitments and obligations under written leases, which have many years to run, for stores and warehouses, and upon which the Kroger Company is liable for rent during the term of such leases. The sum expended for rent in Kentucky in 1929 was $342,000.00; for salaries to employes $1,454,000.00; for the purchase of merchandise in Kentucky $2,338,000.00 and for transportation and truck operations $314,000.00. The question now arises whether the defendant can continue its business without irreparable loss under the confiscatory terms of the challenged Act.

There is nothing in connection with the Kroger business which is in any way injurious to the public health, morals, safety or welfare. On the contrary, Kroger stores have always been a credit to any community where they are located and the evidence shows, without contradiction, that the conduct of its business has been of benefit to the public. We quote from the affidavit of Mr. Bonham, Kroger Record, page 126:

> "Kroger has consistently maintained a policy of having its stores bright, attractive in appearance, and

maintained in strict conformity with all of the sanitary and health regulations with respect to the sale of food, produce and milk. The sale of good foods under sanitary conditions, prepared, processed and kept in conformity with approved health regulations, is beneficial to the public welfare and public health. . . . . The basis upon which Kroger has built its business by selling at low prices and relying upon a large volume of sales for a profitable return upon the value of its business, is of great benefit to the consuming public. It has enabled the public to obtain food at the lowest possible prices. It contributes to eliminate waste in distribution and Kroger in many instances distributes food in direct line from the producer to the consumer. This results in the most efficient and economical distribution of foods, meats, dairy and farm products, which economical and efficient distribution of food supplies is of great public benefit. . . . . Kroger disposes of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume. This rapid turnover assures the sale of fresh goods to the consuming public. In the food business this is particularly important and this method of conducting business has been of great value to the consuming public, because it prevents stale stock, stock wastage and stock spoilage."

The public benefits from the operation of a business like Kroger are explained in the affidavit of Mr. Lyons (Kroger Record, page 107). He said:

"Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. . . . . The 'chain stores' have been conspicuous in developing distribution on a large volume and a low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has

> necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited."

Here we have a large business enterprise, contributing to the welfare of the public and the state, with 16,000 stockholders, whose money has been invested therein, which is suddenly made, to quote the language of the *Cotting case*, the victim of the legislative scalping knife. This scalping process cannot be justified under the police power, and takes the property of the complainant without due process of law in order to "aid" its competitors.

The Act does not purport to be an exercise of the police power. Although it is referred to in one section as a "license" law, the Act contains no provision for either obtaining or issuing any license. The Act contains no provision for the inspection of any retail business. It contains no provision for the regulation of any retail business. No standards for the conduct of retail business are included in the Act. There is nothing throughout the entire thirteen sections which is intended or designed to curb or protect the public against any evils which may inhere or be anticipated in the conduct of any retail business, chain store, department store or otherwise. The class subject to taxation is all retail business of every kind. The Act applies to every storekeeper selling at retail, except storekeepers selling farm products raised in Kentucky. Of course, some storekeepers may be guilty of improper practices but that does not justify a general dragnet applying to good and bad alike. The Supreme Court has held in numerous decisions that such laws are not a proper exercise of the police power. *Tyson & Brother* v. *Banton*, 273 U. S. 418, 429-30; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 537-8; *Truax* v. *Raich*, 239 U. S. 33, 43; *Fairmont*

Creamery Company v. *Minnesota*, 274 U. S. 1, 9; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111. In the *Liggett case*, the Supreme Court, per Sutherland, J., said at page 111:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of public health?"

At page 113, the court said:

> "The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (Citing cases.)

The Court, at page 113, said that the mere stock ownership of a corporation, owning a drug store, could have no real or substantial relation to public health, and that the act created an unreasonable and unnecessary restriction upon private business, saying:

> "No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. *It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered*

pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

Furthermore, the fact that Kroger is required to pay $113,000.00 shows that the tax is not a license law and has no relationship to the cost of inspection or regulation, but is purely a revenue measure. Indeed, it is only fair to the Attorney General to state that he does not attempt to justify the measure as an exercise of the police power and frankly conceded in the course of the oral argument that the sales tax was not an exercise of the police power, but must be justified, if at all, as a revenue law.

The confiscatory effect of the Act upon the lawful business of the Kroger Company is clearly shown by the evidence in the record. Kroger has built its business on the policy of selling food to the consumer at the lowest possible price. This can only be done by accepting a small margin of profit and selling a large volume of merchandise. The margin of profit has steadily narrowed during the past decade, and particularly during the past five years, owing to the keen competition in the grocery business. There is not only competition with individual merchants but keen competition between chain stores and with large co-operative associations and with the powerful wholesale—retail group. The affidavit of Mr. Bonham (Kroger Record, page 123), shows the following for the past four years:

"The combined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows:

SALES	AVERAGE NET PROFIT
1926—$146,009,373	.0288
1927— 161,299,604	.0271
1928— 207,373,551	.0257
1929— 284,953,448	.0223"

Since the filing of said affidavit, the certified public accountant's audit for the year 1930 has been completed and published. This audit shows the net profit of the Kroger Company on the combined sales of all stores for 1930 was only eighty-one hundreds of one per cent (.81%) per dollar of sales. Mr. Bonham states that owing to economic and competitive conditions in Kentucky the company sustained a loss on Kentucky business during the years 1929 and 1930. The experience of the Kroger Company is in line with the general experience of such companies, as shown by the affidavit of Mr. Lyons (Kroger Record, page 108), who says:

> "In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatisfactory merchandise and the fact that such merchandise represents a substantial volume which is necessarily deducted from gross sales, thereby inevitably modifying the percentage above given. *In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.*

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large

> proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66 2-3% of all the net earnings of stores falling within the above averages."

It may be argued that a general sales tax could be shifted to the consumer so that it would not be confiscatory. Whatever merit this argument may have if the tax is laid equally upon all merchants in the same business or class, it has no merit when some are subject to a heavy tax and others in direct competition are not subject to any tax. Competition prevents merchants who are subject to heavy taxes from raising prices to the consumer because in such event trade would go to their competitors, who are not forced to raise prices. Furthermore, the retail price of many products is fixed by advertising and interstate competition so that in practice it is impossible for a retailer to charge prices out of line with prices generally charged for like merchandise. A glaring illustration is the fact that Levy Brothers in Louisville, who are subject to heavy taxes, compete directly with Richmond Brothers, who, because they have only one store in Kentucky, are subject to no taxes. Richmond Brothers have a greater buying power and larger sales generally than Levy Brothers, and it would be impossible for Levy Brothers to raise the price of clothing in face of such competition. For these reasons, Mr. Lyons says (Kroger Record, page 109):

> "Such a tax would necessarily come out of earnings, and frequently out of capital, and would be prohibitory and confiscatory on retail grocery store and department store enterprises."

The affidavit of Mr. Bonham shows that it is impossible to successfully operate an average grocery store if that store is required to pay a tax of $430.00 per store, in addition to all other license fees and ad valorem taxes, and that

a 1% tax on gross sales will actually increase the operating expense of a Kroger store approximately 5½%. Mr. Bonham states that the Kroger Company would have to pay the sales tax out of capital or close a sufficient number of stores to bring the tax within the lower brackets of the Act. By reason of the lease obligations of the Company, it faces irreparable losses whether it attempts to operate under the sales tax law or close stores which cannot be profitably operated.

The Kentucky sales tax confiscates the entire profit of the Kroger Company and actually turns the profit which it is now making on its general business into a loss. This is graphically shown by the following chart:

EFFECT OF KENTUCKY SALES TAX ON PROFITS OF CONCERNS WITH VARYING GROSS SALES AND AT VARIOUS PROFIT RATES.

Amount of Sales	Total Tax Payable	Net Profit of ½ % Before Tax	Net Profit of ½ % After Tax	Net Profit of 1 % Before Tax	Net Profit of 1 % After Tax	Net Profit of 1 ½ % Before Tax	Net Profit of 1 ½ % After Tax
$400,000	$200	$2,000	$1,800	$4,000	$3,800	$6,000	$5,800
500,000	300	2,500	2,200	5,000	4,700	7,500	7,200
600,000	550	3,000	2,450	6,000	5,450	9,000	8,450
700,000	950	3,500	2,550	7,000	6,050	10,500	9,550
800,000	1,500	4,000	2,500	8,000	6,500	12,000	10,500
900,000	2,200	4,500	2,300	9,000	6,800	13,500	11,300
1,000,000	3,050	5,000	1,950	10,000	6,950	15,000	11,950
2,000,000	13,050	10,000	3,050*	20,000	6,950	30,000	16,950
3,000,000	23,050	15,000	8,050*	30,000	6,950	45,000	21,950
4,000,000	33,050	20,000	13,050*	40,000	6,950	60,000	26,950
5,000,000	43,050	25,000	18,050*	50,000	6,950	75,000	31,950
10,000,000	93,050	50,000	43,050*	100,000	6,950	150,000	56,950
15,000,000	143,050	75,000	68,050*	150,000	6,950	225,000	81,950

* Loss.

The above table shows that a business which makes a net profit of one-half of 1% before the tax will sustain a loss of $3,050.00 on $2,000,000.00 of sales after paying the tax and a loss of $43,050.00 on $10,000,000.00 of sales after paying the tax. In 1930 Kroger only earned eighty one hundredths of one per cent profit on its entire gross sales, before the tax. If it is compelled to pay the tax this profit will be turned into a loss. Even if Kroger was able to earn 1% on its gross sales, a fair margin for its business, the

above table shows that its profit would be $6,950.00 on sales of $1,000,000.00. *The table further shows the startling fact that no matter how much it increased its sales above* $1,000,000.00 *on a 1% profit basis, it could not earn one cent over* $6,950.00. No stronger indictment of the sales tax can be written than the figures contained in the above table. A merchant has a constitutional property right to expand his business. Business cannot stand still. It must either go forward or fail. The sales tax places a steel girdle or straight-jacket around large retail business in Kentucky, which effectually prevents such business from expanding and growing.

This is illustrated by the business of Byck Brothers. (Affidavit of Dann Byck, Kroger Record, page 260.) Byck says:

> "Our records show that we make 1% profit for each dollar of sales. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store of our type . . . . . Today the establishment is doing about $700,000.00 worth of business annually and is giving employment to one hundred people. Our growth is due to the adoption of efficient merchandising methods and we would be discarding these methods if we attempted to secure a larger profit than we are making. . . . If we increase our sales the per cent of profit to sales will not increase but the tax would. For example, let us assume that through intense effort and application we are able in 1930 to increase our business an additional $100,000.00, on which we would earn on a 1% basis a net profit of $1,000.00. Under the confiscatory terms of this tax $700.00 of this $1,000.00 profit would be taken. If we gain another $100,000.00 volume and its accompanying $1,000.00 profit, $850.00 of this additional $1,000.00 profit will be taken as tax. . . . . If we are able to reach our goal of $1,000,000.00 by adding another $100,000.00 volume, the entire $1,000.00 profit derived from this increase will be taken as additional tax."

The Supreme Court has said that the Fourteenth Amendment protects property rights against such unlawful destruction. *Liggett Co.* v. *Baldridge*, 278 U. S. 105.

In *Northwestern National Insurance Company* v. *Lee*, 49 Fed. (2nd) 274, the Court held that the imposition of a license fee of $500.00 for each additional agent who participates in the effecting of insurance as a solicitor or broker, or otherwise, is an unreasonable and unconstitutional interference of the right of a foreign fire insurance company to transact business when domestic companies were only required to pay $2.00.

The order granting an interlocutory injunction in that case was affirmed by this Court, 284 U. S. 590.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the Court held that even private schools had a property right in such business which could not be destroyed by an Oregon act requiring parents to send their children to public schools.

It must be remembered that we are dealing in this case with a tax which takes 1% of the sale price of every article sold by the appellants and takes practically nothing from the sale price of a vast majority of its competitors. This is done for the avowed purpose of aiding its competitors. In other words, the legislature proposes to take the property of the appellants in such a manner and in such a large amount that it would be beneficial to the interests of appellants' competitors. Such action is clearly an attempt to take the property of the complainants in violation of the Federal Constitution.

Kentucky Cases.

On the point of the confiscatory nature of the tax it is interesting to note the Kentucky decisions.

Where jurisdiction exists in the Federal courts to hear and determine a controversy, it has been held that the Court will proceed to determine the whole case, including any

rights asserted or questions raised under the constitution and laws of Kentucky. *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175-191; *Ohio Tax Cases*, 232 U. S. 576-587; *Greene* v. *L. & I. R. R. Co.*, 244 U. S. 499; *Texas Co.* v. *Brown*, 258 U. S. 466; *Risty* v. *C. R. I. & P. Railway Co.*, 270 U. S. 378-387.

We have previously set forth the evidence showing that the tax imposed upon Kroger takes more than its entire profit on all of its sales for the year 1930 and turns such profit into a loss. The evidence also shows that over a five-year period from 1926 to 1930, Kroger has only earned a little over two per cent on its gross sales from all its business. It actually lost money on its Kentucky business during the last two years. There has been a steady decline in the percentage of earnings of the company, although its sales have increased. On the basis of an average for the past five years the one per cent sales tax would have taken practically one-half of all Kroger profits. Its actual effect, since its enactment, has been to take all of its profits during 1930 and to compel the company to pay out of capital twenty-nine (.29) hundredths of one (1%) per cent of its gross sales.

The Court of Appeals of Kentucky has repeatedly held that a tax which lays so oppressive a burden upon lawful business, violates section 181 of the Kentucky constitution and the Bill of Rights of the State of Kentucky.

In *Louisville* v. *Pooley*, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582, the Court held unconstitutional an ordinance of the City of Louisville which was passed in order to put people whose occupation was lending money on salaries, out of business. The Court declared that the imposition of a license tax upon the business of lending money on salaries and chattels which equals eighty (80%) per cent of the average earnings of all persons engaged in such business is so unreasonable, oppressive and prohibitive as to be void.

In the case of *Fiscal Court of Owen County* v. *Cox, Court of Appeals of Kentucky,* 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83, the Court held unconstitutional a license tax on wagons. Syllabus 3 of the case reads:

> "A license tax on a four horse wagon used for hauling freight for hire, which is nearly three times as much as that imposed on three horse wagons, is void for discrimination."

In the body of its opinion the Court declared:

> "It may be conceded that, ordinarily, the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall* v. *Com.*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing cases.) While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000.00, or imposing upon every merchant a license of $5,000.00, or upon every washerwoman a tax of $1,000.00 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations; *but*

> *what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax?* Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that *among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life, and the right to acquire property; and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation,* the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. *Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution.* As the evidence in this case shows that the license tax in question is *prohibitive, we have no hesitancy in declaring it invalid.*"

In the case of *Sallsbury* v. *Equitable Purchasing Co.*, 177 Ky. 348, L. R. A. 1918 A 1114, the Court held unconstitutional a license tax upon the business of lending money on salaries. The syllabus of the case reads:

> **"A license tax upon the business of lending money on salaries which is equal to one-third of the net earnings of the largest business of any individual engaged in such occupation, is prohibitive and therefore illegal."**

At page 353 the Court said:

> "When it is admitted, as is done here, that the license fee exacts practically *one-third of the net earnings* of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression, necessarily created, that the license is prohibitive and therefore illegal."

Concluding, the Court says, at page 355:

> "In short, we hold that no municipality, under a free government like ours, has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

In the case of *Hagar* v. *Walker*, 128 Ky. 1 (9), the Court declared:

> "Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it should be so unreasonable or arbitrary as to amount to a confiscation of property, or a denial of the right to engage in a particular trade, occupation or profession, the Courts will interpose to protect the class of persons affected from its oppressive burden on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have 'the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property.'"

In dealing with particular taxes the Court of Appeals of Kentucky has frequently passed on the question whether they were so oppressive as to be unconstitutional.

In *City of Lexington* v. *McQuillan*, 9 Dana 513, the Court said:

> "The legislature in the plentitude of its taxing power cannot have constitutional authority to exact from one citizen, or even one country, the entire revenue for the whole Commonwealth."

In *Sperry* v. *Owensboro*, 151 Ky. 389, the Court struck down as unconstitutional, a city ordinance imposing a tax of $300.00 on a trading stamp company on the ground that

the tax was prohibitive. In the opinion, the Court said, at page 393:

> ". . . . courts will not sustain prohibitive regulations made under the guise of taxation. The plaintiff's business is not unlawful. It is a business which the state itself licenses. And while the city may also tax it, the tax must be imposed in good faith under the taxing power and not for the purpose of prohibiting the business. . . . . We think it evident, from the ordinance as a whole, that the tax of $300.00 on stamp companies was intended to be prohibitive and break up the business. Appellant's gross business per annum under the evidence, amounts to about $5,000.00, and its net profits amount to about $500.00 per annum. To tax such a business $300.00 per annum must have been intended to break it up."

Again at page 394:

> "It is true the business may increase and there may be more profit in it than is shown by the evidence; but the ordinance was evidently aimed at it as it is."

Applying the above language to the case at bar, it is evident that to tax Kroger $113,000.00 *when it only earned at the rate of eighty one* (.81) *hundredths of one* (1%) *per cent on its sales, or* $97,200.00 *on* $12,000,000.00 *of sales "must have been intended to break it up."*

Moore v. State Board of Charities and Corrections, 238 Ky. 243, 239 Ky. 729.

The attack on the Gross Sales Tax Law is based chiefly on the ground that it violates the constitution of the United States. In deciding these questions this Court is not bound by the result reached by the Court of Appeals of Kentucky in regard to the validity or invalidity of the Act insofar as the Federal Constitution is concerned.

Counsel for the appellees may call the Court's attention to the decision of the Court of Appeals of Kentucky in the case of *Moore* v. *State Board of Charities*, 239 Ky. 729, holding the challenged Act valid.

We believe a history of this case is important in determining whether the decision should have any bearing on the results reached by this Court.

In the first place the decision in the *Moore case* was handed down on June 19, 1931. This was six months after the order of submission to the United States District Court (Stewart, record 70). Furthermore, the action on which the decision is predicated was not filed until after the submission to the Federal Court. While the Federal Courts in construing a state statute are bound by the construction placed thereon by the highest Court of the State, we submit that they are not so bound when the case under consideration was presented to them before the action in the State Court commenced. Furthermore, they are not bound by any conclusions of the State Court when those conclusions are mere dicta.

The record in our case contains the testimony of Mr. Shirley Haas (Stewart, record 296). Mr. Haas is Secretary of the Kentucky Food Distributors Association which lobbied for the gross sales tax law. Mr. Haas was the gentleman who distributed the circular which contained the statement that the chains would be walloped by the sliding scale of taxation, that 92% of the independents would be completely exempt from taxation, while 8% would only have a small tax to pay. One of Mr. Haas' bulletins refers to a suit which was to be filed in the Franklin Circuit Court to contest the sales tax law. At page 300 of the Stewart record, Mr. Haas states that this reference was made in regard to a man who had been picked out to file the suit. He goes on to say that he was informed "through Leslie Morris, who represented the Penal Charities Board, that

they would pick out someone as plaintiff to bring the action to test the law."

Later Mr. Leslie Morris acted in conjunction with the Attorney General in defense of the suit which was filed by Forrest Moore.

The record in the *Moore case* discloses the fact that he had no tax to pay. In other words, he was one of the beneficiaries under the Act and was in no way discriminated against. The Court of Appeals held that inasmuch as the record showed he was not one of the class who would be compelled to pay any tax, he was not a proper person to bring the suit (238 Ky. 243). The Court also refers to the fact that Moore only introduced a short affidavit in support of his contentions.

The complainants in these cases and the taxpayers whom they represent, were not parties to the litigation in the State Court, their suits having been brought in the Federal Court.

With great reluctance, we feel constrained to point out to this Court the circumstances of the State Court litigation.

As indicated by the first opinion (238 Ky. 243), Forrest Moore brought suit in equity in the Franklin Circuit Court, as a general taxpayer, to enjoin the State Board of Charities and Corrections from making a contract with one J. M. Perkins for the purchase of a tract of land adjoining the State Reformatory at Frankfort, and *to enjoin the members of the State Tax Commission from proceeding with the enforcement or collection of the taxes imposed by the challenged Act.*

It appeared from such contract that the purchase price of the land contracted for was to be paid "*only* out of the Board's revenues arising from the collection of the gross sales tax," and that "in the event said law should be de-

clared unconstitutional, the contract provided that either party reserved the right to terminate it." (238 Ky. 244.)

Hence there was no real controversy between the plaintiff and the State Board of Charities and Corrections. It is impossible to escape the conclusion that the whole scheme of the Forrest Moore suit was to make a pretended attack upon the constitutionality of the Gross Sales Tax Law, with a view to losing the case.

This is demonstrated beyond a doubt by the testimony of Shirley E. Haas in the records before this Court (Stewart, 93-100; Kroger, 296-304).

Mr. Haas testified that he actively promoted the passage of the Gross Sales Tax Law through the Legislature, and that he actively participated in financing the expenses of the *Forrest Moore case,* and he filed with his deposition bulletins issued by him to various retail stores urging them to contribute to the expense of the defense of the suit which was ultimately brought in the name of Forrest Moore, *a plaintiff selected for that purpose* by counsel representing the *defense* in the case.

Notwithstanding the provisions of Section Ten of the challenged Act, positively interdicting a suit in equity as a remedy for testing the validity of the Gross Sales Tax Law, the Franklin Circuit Court took jurisdiction of Forrest Moore's suit, in the form in which he brought it, and rendered a judgment upholding the validity of the law.

Moore appealed to the Court of Appeals for the purpose of eliciting a decision by that Court on the constitutionality of the Act, and on March 27, 1931, that Court, in *Moore* v. *State Board of Charities and Corrections, et al.,* 238 Ky. 243, reversed the judgment of the Franklin Circuit Court solely on the ground that Forrest Moore, not being a taxpayer under the Act, could not question its validity. For that reason the Court of Appeals would not undertake to pass upon the validity of the Gross Sales Tax Law in the

Forrest Moore case until and unless some taxpayer under the law should be made a party to the litigation.

On the return of the *Forrest Moore case* to the Franklin Circuit Court, and while these cases were still under submission to the Court below, the D. T. Bohon Company, a taxpayer under the Act, was by amendment to Moore's petition made a defendant and called upon to assert its claims in that litigation.

Of course, the Bohon Company did not have to join in that litigation for the purpose of making an attack upon the validity of the challenged Act, and equally, of course, Forrest Moore could not have proceeded in that litigation without the Bohon Company.

The Court of Appeals having the matter presented to it for a second time held that the Gross Sales Tax Law of Kentucky was constitutional. (239 Ky. 729.)

We believe that the record in the *Bohon case* clearly indicates that the Bohon Company was no more representative of the class of taxpayers upon whom the burdens of the gross sales tax were intended to fall, than was Forrest Moore.

As a matter of fact it has since been shown by another Court of Appeals case that Bohon's interest was to sustain rather than defeat the law inasmuch as he had a contract to sell the State Board of Charities some land which could only be consummated if the gross sales tax law was upheld.

The State vigorously contends in this case that injunctive relief is not permissible in view of Section Ten of the Act. We believe that this argument is not applicable to the case in the Federal Courts, but if it is correct it would certainly have been conclusive in the *Bohon case*. Consequently the remainder of the Court's decision in that case is mere dicta and is not binding on this Court.

Furthermore, the record in the *Bohon case* showed that the D. T. Bohon Company at the most only had to pay

$253.52 under the law. Its sales were taxed in the lower brackets. The Court did not have before it therefore the issue of deprivation of equal protection of the law, inasmuch as the law discriminates against those in the higher brackets in favor of persons in the lower brackets. It is a well settled rule that courts determine the constitutionality of a statute on the basis of its effect on the party before it and not on the claim which that party sets up as to how the law would effect some other person who is not before the court.

What has been said in regard to equal protection is equally true in regard to the point of confiscation. A tax of $253.00 on the sales of a merchant for an entire year cannot be deemed confiscatory, but a tax of $113,000.00 is in an entirely different category. A decision that Bohon's $253.00 tax is not confiscatory should certainly have no effect on this Court on the question of whether the tax which the Kroger Company or the tax which the Stewart Company has to pay is confiscatory.

That the Court in the *Moore case* did not go into the issue of the confiscatory nature of the tax measure for the reason that the Bohon tax was low, is indicated by the fact that none of the decisions of the Kentucky Court of Appeals which we have heretofore referred to was mentioned in the Moore decision.

There was nothing in the record in the *Bohon case* which indicated whether that company operated a farm either in or out of Kentucky. We claim that the Kentucky Gross Sales tax law violates the interstate commerce provision of the Federal Constitution because it imposes a tax on merchants selling farm products raised outside of Kentucky and exempts merchants selling farm products raised in Kentucky. The only one who can raise this point is a merchant who has a farm outside of Kentucky and who brings the products of that farm into Kentucky for sale. The Kroger Company is such a merchant (Kroger record 126,

221-226). The opinion of the Court of Appeals in regard to this point therefore is also dicta and is not binding on this Court.

The same is true in regard to the statements of the Court of Appeals in regard to Interstate Commerce. This question did not arise insofar as D. T. Bohon Company or Forrest Moore were concerned. It does arise in the case of the Stewart Dry Goods Company.

In the original *Moore case* (238 Ky. 243) the Court declared:

> "It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard. *Indeed, it might be argued, with what soundness we expressly do not say, that they would not even be bound by the decision in this case because of the lack of representation.*"

The Court of Appeals of Kentucky has therefore recognized, that they were doubtful whether persons who had a just cause of complaint under the gross sales tax law would be bound by a decision when they were not represented in the case which led to the decision.

On this record we have shown the distinction between the four complainants in this case and Forrest Moore and D. T. Bohon Company. Forrest Moore had no tax to pay and the D. T. Bohon Company fell in the lower brackets, and there was no discrimination as to them.

Using the language of the Court of Appeals of Kentucky, we believe that the complainants in this case are not bound

by the decision in the Forrest Moore case because of lack of representation. Furthermore, we believe they are not bound by that decision because the issues involved in these cases were not before the Court of Appeals of Kentucky in the Forrest Moore case.

The Federal Courts are of equal dignity with the State Courts. The Constitution of the United States has granted to parties under certain circumstances a right to present their controversy for adjudication to a Federal Court rather than to appear before a State Court. We believe that a Federal Court, once a question is submitted to it, should have a right to determine the issues without any interference by the State Court. This is especially true when the case in the State Court is sponsored by the opposing parties for the purpose of securing a decision which will foreclose the rights of the litigants in the Federal Court. Such action taken in the State Court is in total disregard of the spirit of comity which should exist between those coordinate branches of the Government.

Of course the Court of Appeals of Kentucky decided the case which was presented to it. That was all it did. It did not and could not decide a case on issues presented as they have been in these cases now before this Court. We believe that if the appellants in this case would appear before the Court of Appeals of Kentucky that Court would grant them a full consideration based on the fact that their record presented issues not raised in the D. T. Bohon record. We believe that this Court should decide this case without any regard to the result reached in the Bohon suit.

The Forrest Moore case is distinguishable from the instant case inasmuch as we are here asking for an interlocutory injunction under the rule of *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

The rule governing this Court upon the pending applications for interlocutory injunctions is thus laid down in that case:

> "Where the questions presented by an application for an interlocutory injunction are grave, and an injury to the moving party will be certain and irreparable if the application be denied and a final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by bond, the injunction usually will be granted."

In passing upon the pending applications for interlocutory injunctions, this Court must give weight to the circumstance that the plaintiffs have had no opportunity whatever to controvert the *ex parte* affidavits filed by defendants.

Under the rule above quoted, this Court is *now* called on to decide only, if the plaintiffs, upon their proof, have made out a *prima facie* case showing certain and irreparable injury if the application be denied and if a final decree should be in their favor *after* they have had an opportunity to controvert the evidence contained in *ex parte* affidavits resisting the application.

On the other hand, the case before the Court of Appeals came up for final hearing. The plaintiff in that case conceded the correctness of the affidavits. Once an interlocutory injunction is granted in this case and the case is submitted on final hearing, we believe that we can successfully controvert the affidavits filed by the defendant. We believe that the complainants should not be foreclosed by a case where the plaintiff intentionally made no attempt to controvert the affidavits for the purpose of assisting the Attorney General in sustaining the taxing measure.

The Moore case was entirely ignored by the District Court. It should not be considered here because it arose and was decided upon issues and on a record obviously framed by both sides of the case for the purpose of sustaining the law, and actuated by a desire to forestall and influence these proceedings, previously filed, argued and submitted to the three judge Federal Court.

CONCLUSION.

For the reasons herein stated, we urge that the judgment of the lower Court dismissing the Bills of Complaint upon the ground that the claimants have an adequate remedy at law, be reversed, and that these cases should be remanded to the lower Court with instructions to grant the interlocutory injunctions prayed for by the appellants.

Respectfully submitted,

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APPENDIX A.

"AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand (Four hundred thousand Dollars) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand (Four hundred thousand dollars) Dollars and not exceeding Five hundred thousand (Five hundred thousand dollars) Dollars; five-twentieths of one per

cent on the excess of the gross sales over Five hundred thousand (Five hundred thousand dollars) Dollars, and not exceeding Six hundred thousand (Six hundred thousand dollars) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand (Six hundred thousand dollars) Dollars, and not exceeding Seven hundred thousand (Seven hundred thousand dollars) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand (Seven hundred thousand dollars) Dollars and not exceeding Eight hundred thousand (Eight hundred thousand dollars) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand (Eight hundred thousand dollars) Dollars and not exceeding Nine hundred thousand (Nine hundred thousand dollars) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand (Nine hundred thousand dollars) Dollars, and not exceeding One million (One million dollars) Dollars; one per cent on the excess of the gross sales over one million (One million dollars) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission, from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the

amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, one thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one, One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter he enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid

into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section Four thousand and two hundred and sixty-three-four of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications herein required to be made, shall be confidential, and any person divulging such information shall be guilty of misdemeanor and upon conviction, shall be fined not exceeding Five Hundred (Five hundred dollars) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prose-

cutions for any other infraction of the tax laws of this State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of misdemeanor, and upon conviction shall be fined not exceeding One thousand (One thousand dollars) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to t[illegible] penalty imposed in Section Five of this Act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the ag-

grieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor."

APPENDIX.

KENTUCKY LAWS CITED.

(CARROLL'S 1930 EDITION, KENTUCKY STATUTES.)

I.

GROSS RETAIL SALES TAX LAW.

Acts 1930, Ch. 149 (Baldwin's 1932 Supplement, Ky. Stat., §4202a-1-12):

"AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm

products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

§2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one percent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over

Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

§3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to

every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

§4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

§5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the

rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

§6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and

penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

§7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the

whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

§8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

§9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

§10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the

tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

§11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

§12. All laws and parts of laws in conflict

herewith are hereby repealed to the extent of such conflict.

§13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

Approved March 17, 1930."

II.

STATUTES AUTHORIZING REFUNDS OUT OF TREASURY.

Ky. Stat., §162:

"When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

Ky. Stat., §4224b-9:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed for any reason whatever, but

the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the auditor of public accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of its payment. If it is legally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the auditor of public accounts then in office to issue his warrant on the treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the treasurer shall pay the same out of the public road fund of the state. A separate suit need not be filed for each separate payment made by any taxpayer, and a recovery may be had in one suit for as many illegal payments as may have been made, and which are not barred by the limitation of two years herein imposed."

Gross Sales Tax Law, Section 10.
(Appendix, pp. 7-8.)

III.

LEGAL RESTRICTIONS UPON REFUNDS OUT OF STATE TREASURY.

Kentucky Constitution, §230:

"No money shall be drawn from the state treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually."

Ky. Stat., §143:

"A warrant of the auditor upon the treasury shall state upon its face the date, amount, and the name of the person to whom payable, and on what account, and out of what fund to be paid; and shall not be issued unless the money to pay the same has been appropriated by law; and he may require any claimant to state on the face of his claim the law under which it is payable."

Ky. Stat., §4688:

"No money shall be paid out of the treasury except upon the warrant of the auditor, drawn upon the treasurer as now or may hereafter be provided by law, and then only by the check of the treasurer upon a designated state depository; and no such check shall be given by the treasurer, even though the auditor issues a warrant therefor, unless the law under which the money may be claimed expressly directs and orders that it shall be paid out of the public treasury."

Ky. Stat., §4688a-2:

"Whenever any warrant hereafter issued by the auditor of public accounts shall be presented to the treasurer for redemption, and the funds appropriated for the purpose for which said warrant was issued are exhausted, the treasurer shall endorse thereon the date of its presentation with the words 'No funds with which to pay this warrant, and it bears five per cent (5%) interest from this date until called in,' with his official signature thereto, and such warrant shall thereafter bear interest at the rate of five per cent (5%) per annum, payable semi-annually."

Ky. Stat., §4688a-4:

"The treasurer may, whenever there are funds in his hands amounting to as much as fifty thousand dollars ($50,000.00), subject to the payment of outstanding warrants, call for such number of warrants by serial number, which, in the aggregate, do not exceed the amount of money on hand, for the purpose of redeeming them and which have no date of maturity fixed for their payment as provided in §4688a-2 of this act. The call of the treasurer shall be published by him for ten consecutive days in a daily newspaper published in this state, and no warrant so called in shall bear interest after the expiration of said ten days' publication. Nothing herein, however, shall prevent the payment by the treasurer of said warrants due according to the date of issue, if presented without awaiting such publication."

IV.

RIGHT TO SUE STATE OR AUDITOR OF PUBLIC ACCOUNTS AND VENUE OF ACTION.

Kentucky Constitution, §231:

"The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

Ky. Stat., §340a-1:

"That the order of any of the courts of this Commonwealth now authorized by law to approve and allow the fee-bills, settlements, credits, charges, and claims against the treasury of any

of the officers of the Commonwealth, or of other persons having claims against the treasury, shall only be regarded as *prima facie* evidence of the correctness and legality of such fee-bill, settlement, credit, charge, or claim; and such order shall in no case be treated as a judgment, or be made conclusive against the state; but the auditor, if he believe such fee-bill, settlement, credit, charge, or claim is fraudulent, erroneous, or illegal, may, with the advice of the attorney-general, refuse to pay, and may contest the same in the Franklin circuit court, *which said court shall have jurisdiction of all suits or proceedings against the auditor to compel the payment of claims against the treasury.*"

(Italicized portion construed in Greene v. Wolfe, 175 Ky. 58, to restrict jurisdiction to Franklin Circuit Court.)

Gross Sales Tax Law, Section 10—*Ante*, pp. 7-8.

(Venue of action prescribed by Section 340a-1, Kentucky Statutes.)

V.

CORPORATION LICENSE TAX.

Ky. Stat., §4189-2:

"Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears

to the aggregate amount of property owned and business transacted in and out of this state."

VI.

LEGISLATIVE ACTS DECLARING INSOLVENCY OF GENERAL FUND.

Acts of 1932, Ch. 20, pp. 119-123.
See brief, pages 18-20.
Acts of 1926, Ch. 13, pp. 85-89.
See brief, page 17.
Acts of 1924, Ch. 122, pp. 436-444.
See brief, page 17.